EXHIBIT 10

CHARLES GRIMM et al., Plaintiffs and Appellants, v. CITY OF SAN DIEGO et al., Defendants and Respondents

Civ. No. 16974

Court of Appeal of California, Fourth Appellate District, Division One

94 Cal. App. 3d 33*; *156 Cal. Rptr. 240*; *1979 Cal. App. LEXIS 1833

June 13, 1979

SUBSEQUENT HISTORY: [***1] Appellants' Petition for a Hearing by the Supreme Court was Denied August 15, 1979.

PRIOR HISTORY: Superior Court of San Diego County, No. 405606, Alfred Lord, Judge.

DISPOSITION: The order is affirmed.

COUNSEL: Lewis & Marenstein and Richard A. Shinee for Plaintiffs and Appellants.

John W. Witt, City Attorney, Jack Katz, Chief Deputy City Attorney, and Thomas F. Calverley, Deputy City Attorney, for Defendants and Respondents.

JUDGES: Opinion by Wiener, J., with Brown (Gerald), P. J., and Staniforth, J., concurring.

OPINION BY: WIENER

OPINION

[*35] [**241] Article IX of the San Diego City Charter provides for the creation of a retirement system (System) for city employees to be managed by a board of administration (Board). (San Diego City Charter, art. IX, §§ 141-148.1.) The city council, pursuant to its power under section 146 of the charter, has enacted through the years a series of [*36] ordinances affecting the System which are now contained in the San Diego City Municipal Code. (San Diego Mun. Code, § 24.0100 et seq.)

The sole issue in this appeal is whether the city was authorized to pass Ordinance No. 12132 (new series) establishing nine members of the thirteen-member Board as a quorum [***2] and requiring a majority vote of the entire Board for final action on any Board decision except a vote to adjourn. [1] We conclude the trial court properly found the ordinance to be a lawful enactment and affirm the order denying plaintiffs, as members of the Board, their requested preliminary injunctive relief.

1 The city council enacted Ordinance No. 12132 (new series) which was codified as section 24.0109.1 of the San Diego Municipal Code and became effective on September 23, 1977. It provides: "Nine (9) of the members elected and appointed to the Board pursuant to Section 144 of the Charter shall constitute a quorum to do business or conduct a hearing but a lesser number may take action to adjourn a meeting or hearing from time to time. The affirmative vote of a majority of the members elected and appointed to the Board shall be necessary to pass any vote and take final action on any decision before the Board except that a vote to adjourn may be adopted by a majority of the members present."

The cause of [***3] this litigation is the direct conflict between the ordinance passed by the city and the quorum requirement established by the Board itself. Rule 10 of the Board provides for a quorum of a majority, or seven, of its members and an affirmative vote of a majority of those present as necessary for the passage of any business. Plaintiffs contend the city council is not authorized by the charter to enact an ordinance establish-

ing quorum requirements for the Board and, consequently, their action resulted in an amendment to the city charter in violation of *article XI, section 3 of the California Constitution*. [2] The resolution of this issue turns on the proper construction of the relevant charter provisions.

2 *Article XI, section 3 of the California Constitution* provides:

"(a) For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments.

"(b) The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body.

"(c) An election to determine whether to draft or revise a charter and elect a charter commission may be required by initiative or by the governing body.

"(d) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."

[***4] [*37] Section 141, the enabling clause of article IX, authorizes the city council to establish a retirement system by ordinance. Section 144 mandates the creation of a managerial body for the System and enumerates its authority, composition and function. The section provides in pertinent part:

"The system shall be managed by a Board of Administration which is hereby created, consisting of the City Manager, City Auditor and Comptroller, the City Treasurer, three members of the Retirement System to be elected by the active membership, one retired member of the retirement [**242] system to be elected by the retired membership, an officer of a local bank, and three other citizens of the City, the latter four to be appointed by the Council . . . .

"The Board of Administration may establish such rules and regulations as it may deem proper . . . .

"The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; and shall have exclusive control of the administration and investment of such fund or funds [***5] as may be established; . . ." Section 146 of the charter authorizes the city council: ". . . to enact any and all ordinances necessary, in addition to the ordinance authorized in Section 141 of this Article, to carry into effect the provisions of this Article; and any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be a part hereof as fully as if drawn herein."

(1) San Diego is a charter city. It can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law. Consequently, "'[within] its scope, such a charter is to a city what the state Constitution is to the state.'" (*San Francisco Fire Fighters v. City and County of San Francisco (1977) 68 Cal.App.3d 896, 898-899 [137 Cal.Rptr. 607].*) **(2)** "*Article XI, section 5, subdivision (b) of the California Constitution* [gives] full power to charter cities to provide for the compensation of their employees. It is clear that provisions for pensions relate to compensation and [***6] are municipal affairs within the meaning of the Constitution." (*City of Downey v. Board of Administration (1975) 47 Cal.App.3d 621, 629 [121 Cal.Rptr. 295].*)

[*38] **(3)** A city council's decision regarding a pension system must be upheld unless expressly prohibited by the city charter. (*Estes v. City of Richmond (1967) 249 Cal.App.2d 538, 545 [57 Cal.Rptr. 536].*) "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. [Citations.] . . . All rules of statutory construction as applied to charter provisions [citations] are subordinate to this controlling principle. . . . A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. . . . Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied." (*City of Grass Valley v. Walkinshaw (1949) 34 Cal.2d 595, 598-599 [212 P.2d* [***7] *894].*)

(4) In approaching our task of interpretation, we are further guided by the following principles of statutory construction specifically relating to charter pension provisions: "Although the legislative intent, as evidenced by the provisions of the law, and judicial construction

thereof, is controlling, pension laws, being remedial in nature, should be liberally construed in favor of the persons intended to be benefited thereby. However, a strained and unreasonable construction should not be adopted, and it should be remembered that the construction should protect both the municipality and the employee." [Fns. omitted.] (McQuillin, Municipal Corporations (3d ed. 1973) § 12.143, p. 600.) Ambiguity and uncertainty in pension legislation requires a construction that will, if reasonably possible, accomplish the purpose of the legislation. (*Terry v. City of Berkeley (1953) 41 Cal.2d 698, 701-702 [263 P.2d 833]*; *Newhouser v. Board of Trustees (1971) 15 Cal.App.3d 322, 327 [93 Cal.Rptr. 166]*.)

[**243] **(5)** The statutory scheme under scrutiny provides for the establishment of a retirement system for compensated city officers and employees by the city council through [***8] ordinance. However, the charter directs that a Board of Administration shall be created to manage the system. The Board, as the managing entity, is authorized by section 144 to "establish such rules and regulations as it may deem proper . . ." and to "be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system . . . ." In other words, the Board, vested with the management of the retirement system, is authorized by the charter to make such rules and regulations as [*39] it deems proper for the administration of the system. (See also San Diego Mun. Code, § 24.0901.) The charter further provides that the Board shall be the sole authority and judge, under such general ordinances as may be adopted by the council, to determine when members may be admitted to and continue to receive benefits of any sort under the System. (See *Lyons v. Hoover (1953) 41 Cal.2d 145, 148 [258 P.2d 4]*; San Diego Mun. Code, § 24.0901; 38 Cal.Jur.2d, Pensions, § 32, p. 353.) Thus, while it is the function of the Board to act upon individual cases, the [***9] city council has been conferred the authority to control the Board's activities by "general ordinances." (See *Lyons v. Hoover, supra, at p. 148*; 38 Cal.Jur.2d, *op. cit. supra, at p. 353*.)

This latter determination of the city council's role is supported by the presence of section 146 within the charter empowering the council "to enact any and all ordinances necessary, in addition to the ordinance authorized in section 141 of this Article, to carry into effect the provisions of this Article . . . ." In *Montgomery v. Board of Admin., etc. (1939) 34 Cal.App.2d 514, 521 [93 P.2d 1046, 94 P.2d 610]*, this court held section 146 to be constitutional, explaining that "the section gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority [however] to pass any enactment that conflicts with the charter provisions."

Although the quorum requirement in controversy could be easily branded as a mere procedural housekeeping provision and hence an administrative rule which could be enacted only by the Board under its rule-making authority in section 144, it cannot be so characterized without disregarding the [***10] substantive impact of a quorum requirement and without violating the intent of the charter provisions, especially relating to the make-up of the Board. "The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons." (Robert's Rules of Order (rev. ed. 1970) p. 16.) The charter mandates not only the creation of the Board, but more importantly, its composition (see § 144, *supra*). The evident purpose of this latter provision is to secure a board as objective, fair and competent as possible through the representation of all those interests necessarily involved within a public service retirement system. Accordingly, a quorum requirement like rule 10 enacted by the Board providing for a quorum of a majority, or seven, of its members and an affirmative vote of a majority of those present (possibly four within a minimum quorum) as necessary for the passage of any business matter would be contrary to the charter. For, accompanying the cited purpose of the [*40] composition provision is the necessarily implied intent to have this "representative" Board benefited by the perspectives, opinions and [***11] values of its varied membership and thus their vote representative of such diverse interests. Hypothetically, the possibility exists that the whim of four members of the thirteen-member Board could be determinative of any business matter and, taken to its extreme, plaintiffs' argument would permit the Board to establish a one-member quorum. Clearly, such possibilities are in conflict with the intent and purpose of section 144 of the charter and, indeed, present us with a denial of true majority representation.

[**244] On the other hand, the city council's enactment of the quorum of nine members and an affirmative vote of a majority of the entire Board (seven members) as necessary to pass any vote and take final action on any decision except an adjournment vote, is fully consistent with the charter pension provisions. This quorum requirement not only insures the participation of more than the majority of the Board, but, of greater significance, guarantees that Board decisions shall be representative of the majority of the entire Board regardless of the number of members present considering and voting on a particular matter. It is further representative of the other quorum requirements [***12] contained in the charter. (See §§ 15, [3] 146, *supra*.) Finally, in light of the nature of the city council's more stringent quorum re-

quirement which effectuates the intent behind charter section 144, the city council's enactment of the ordinance is authorized by the express language of charter section 146.

> 3 Charter section 15 provides: "A majority of the members elected to the Council shall constitute a quorum to do business, but a less number may adjourn from time to time and compel the attendance of absent members in such manner and under such penalties as may be prescribed by ordinance. Except as otherwise provided herein the affirmative vote of a majority of the members elected to the Council shall be necessary to adopt any ordinance, resolution, order or vote; except that a vote to adjourn, or regarding the attendance of absent members, may be adopted by a majority of the members present. No member shall be excused from voting except on matters involving the consideration of his own official conduct or in which his own personal interests are involved."

[***13] Plaintiffs further assert "that once the benefits are established by the City Council in accordance with Section 141, their legislative role, as it pertains to the pension system, ceases." This assertion is without merit in light of the presence of section 146 empowering the council "to enact any and all ordinances necessary, *in addition to the ordinance authorized in Section 141 of this Article*, to carry into effect the provisions of this Article . . . ." (Italics added.) Section 146 does not contain the asserted [*41] limitation as there is no basis to imply a time limit on the city council's role as overseer to assure performance of the charter pension provisions. [4]

> 4 Plaintiffs also urge charter section 143.1 is in direct conflict with Ordinance No. 12132 rendering the latter null and void. Section 143.1 provides: "No ordinance amending the retirement system which affects the benefits of any employee under such retirement system shall be adopted without the approval of a majority vote of the members of said system." We reject this contention as the ordinance in question does not affect in any manner either the substantive benefits or the vested rights of any member of the retirement system.

[***14] The order is affirmed.

LEXSEE 69 CAL. 2D 336

LOID D. BELLUS et al., Plaintiffs and Respondents, v. CITY OF EUREKA, Defendant and Appellant

S. F. No. 22236

Supreme Court of California

69 Cal. 2d 336; 444 P.2d 711; 71 Cal. Rptr. 135; 1968 Cal. LEXIS 243

September 13, 1968

SUBSEQUENT HISTORY: Appellant's Petition for a Rehearing was Denied October 9, 1968. Traynor, C. J., McComb, J., and Burke, J., were of the Opinion that the Petition should be Granted.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Humboldt County. J. Everett Barr, Judge. *

* Assigned by the Chairman of the Judicial Council.

Action for declaratory relief by members of police and fire departments that pension fund payments provided for under a city ordinance are a general obligation of the city.

DISPOSITION: Affirmed. Judgment for plaintiffs affirmed.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1a) (1b) (1c) Municipal Corporations--Ordinances--Construction of Pension Provisions. --The City of Eureka, in enacting ordinance No. 2262 providing for a pension plan for members of its police and fire departments, could not be held to have necessarily incorporated the substantive, as distinguished from procedural, provisions of the State Pension Act (now *Gov. Code, §§ 45300-45317*), and in a judicial review of the city's pension obligations, it was necessary to construe, not the ordinance in light of the act, but merely the act in light of its incorporation into the ordinance, where, although there was no express provision in the city charter relating to a pension plan, such a provision, to remove the plan from the control of general law, had been specifically declared unnecessary by an amendment to the city charter (Stats. 1917, ch. 12, § 22), where, also, the city resolutions and an election ordinance for adopting the plan made only passing reference to the state act, and where ordinance No. 2262 itself referred to the act only once, on a matter of procedure, and contained several substantive provisions not found therein.

(2) Id.--Legislative Control--Municipal Affairs Amendment of 1914: Ordinances. --Charter cities which possess complete power over municipal affairs may adopt part of the general law in an ordinance governing a municipal affair without thereby being bound by all provisions of that general law.

(3) Id.--Ordinances--Conflicts With General Laws. --Charter cities have full power to regulate municipal affairs, and ordinances governing municipal affairs supersede general laws insofar as the latter conflict with the ordinance unless the state has preempted the field.

(4) Pensions--Retirement Systems. --The State Pension Act (*Gov. Code, §§ 45300-45317*) by its own terms makes clear that its provisions are not intended to preempt the field of pensions for municipal employees.

(5) Municipal Corporations--Legislative Control--Pensions. --The 1914 amendment to the *Cal. Const., art XI, §§ 6, 8*, removed the requirement that, in the absence in a city charter of an express provision relating to a pension plan, the city had to incorporate in any such plan all of the State Pension Act (now *Gov. Code, §§ 45300-45317*) (overruling *Blake v. City of Eureka (1927) 201 Cal. 643 [258 P. 945]*).

(6) Id.--Legislative Control--Municipal Affairs Amendment of 1914. --The purpose of the 1914 amendment to *Cal. Const., art. XI, §§ 6, 8*, was to free cities which availed themselves of "home rule" of the

control of general laws in the area of municipal affairs, and to give them complete control over such matters whether or not their charter expressly enumerated a power over the municipal affair in question.

(7) Id.--Charters--Construction. --Under section 22 of the 1917 amendment to the Eureka City Charter (Stats. 1917, ch. 12), general laws control the city's municipal affairs unless the city by charter amendment or by passage of an ordinance exercises its power acquired by adoption of "home rule" through the 1914 Amendment to *Cal. Const., art. XI, §§ 6, 8.*

(8a) (8b) Id.--Ordinances--Construction of Pension Provisions. --In the absence of an explicit provision limiting the City of Eureka's pension liability to the actual amount in the fund established for its police and firemen (ordinance No. 2262) and in the absence of any vote by the police and firemen to increase their salary deductions or to decrease pro rata their pension payments, the city's general obligation for the full amount of the planned benefits in the event of any deficit in the fund is compelled, under the rule of liberal construction applicable to municipal pension plans, by the provisions in the ordinance that an employee eligible for retirement or disability pay "shall" receive a certain amount, that vest the beneficiaries of the pension plan with a "property interest" in the fund for purposes of withdrawal and receipt of payments, and that declare that pension payment shall not be reduced without the majority approval of both departments.

(9) Id.--Officers, Agents, and Employees--Retirement. --Among the purposes of providing pensions under a city charter or ordinance are to induce people to enter and continue in the service of the city and to provide sufficient subsistence for retired or disabled officers (or their dependents) who have performed their obligations under the employment contract, of which the pension provisions form an integral part.

(10) Id.--Contracts--Liability. --A charter city, possessed of plenary power to adopt a pension system imposing on it a general obligation, cannot escape liability for those pension payments which it has led its employees reasonably to expect. In this respect it is no different from any other employer or public service institution which induces reliance on a contract that may reasonably be interpreted to afford a protection already impliedly promised.

COUNSEL: Melvin S. Johnsen, City Attorney, for Defendant and Appellant.

Hill & Neville and Robert W. Hill for Plaintiffs and Respondents.

JUDGES: In Bank. Tobriner, J. Peters, J., Mosk, J., and Sullivan, J., concurred. Burke, J., dissents. Traynor, C. J., and McComb, J., concurred.

OPINION BY: TOBRINER

OPINION

[*338] [**712] [***136] Plaintiffs, members of the Police and Fire Departments of the City of Eureka suing on behalf of themselves individually and as representatives of the other members [*339] of the two departments, sought a declaratory judgment that the pension payments directed to be made by Ordinance No. 2262, as amended, constitute a general obligation of the defendant, City of Eureka. The trial court found for plaintiffs. The City of Eureka appeals, contending that the pension payments are to be made solely from funds assigned to the retirement fund.

The complaint alleged "That an actual controversy has arisen between the parties in relation to the interpretation of said ordinance in that the parties are in dispute as to whether, under said ordinance and amendments thereto, the said ordinance creates a general tax liability of the City of Eureka from which benefits to plaintiffs and those similarly situated are to be paid, or whether said fund created by said ordinance is to be financed solely by contributions from the members of each Department [and matching contributions by the City as] mentioned therein."

Plaintiffs contend that any deficit in the retirement fund must be met by the City. The City argues that under express limitations of the State Pension Act (now *Gov. Code, §§ 45300- 45317*) and of the city ordinance itself, it can be required to do no more than match the contributions of the members of the pension plan. In support of its contention, the City points to the parties' stipulation that the ordinance was adopted "under and in pursuance of the authority of Chapter 321 of the Statutes of 1937, as amended by Chapter 1080 of Statutes of 1941 [hereinafter the 'State Pension Act'], to which statutes reference is made in Section 17 of said ordinance; . . ." As we explain below, the ordinance, which is set out in the margin, [1] may [**713] [***137] have adopted only the procedural provisions of [*340] the State Pension Act, and, secondly, even if the ordinance incorporates the substantive as well as the procedural provisions of the state act, the substantive provisions as incorporated into the pension ordinance must be construed in light of the well-established rule of liberal construction [**714] [***138] of pension plans to protect the reasonable expectations of the employees. [*341] Applying this rule

to the State Pension Act as incorporated into the ordinance, we conclude that the absence of any express limitation of the City's liability to the amount in the fund renders it liable for the full amount of benefits provided by the pension plan.

1 Ordinance No. 2262 provides, in relevant part, as follows:

Section 3 provides conditions for the retirement of members of the police and fire departments, and then states that after retirement a member "shall be paid from such Fund a yearly pension, in semi-monthly installments, equal to one-half the amount of the salary attached to the rank which he may have held in such Fire Department or Police Department for a period of One (1) Year next preceding the date of his retirement. That said one-half payable is the basic rate and shall be determined by the Commission [see sections 1-2 of the ordinance] in accordance with the amount of money in the Fund, as hereinafter provided."

Section 4 provides for payment of a pension to certain survivors "in the event of the death of any member of the Fire or Police Department, who shall, at the time of his death, be receiving a pension, or be eligible to receive a pension, as provided in Section 3 of this Ordinance, then, and in that event, and in the same manner the pension which such Fireman or Policeman was either receiving, or entitled to receive, . . ."

Sections 5, 6, and 8 govern retirement payments upon a showing of disability.

Section 7 provides: "Whenever any member of the Fire or Police Department shall die from causes other than as a direct or indirect result of the actual performance of his duty as a Fireman or Policeman, then his widow or children, or if there be no widow or children, then his mother or father, or other heirs, shall be entitled to receive the total contributions made by such member, plus a reasonable rate of interest, to be set by the Commission, less one-half that amount received as a pension before death. That in the event any Fireman or Policeman shall die without heirs, the amount collectible by him hereunder shall remain in the Fund."

Section 10 provides: "The Retirement Fund shall be established and maintained in the following manner: -- That there shall be deducted from the regular monthly salary of each member of the Fire and Police Department Five (5) Per Cent thereof, as a basic rate, to be placed in said Fund. That the Council of the City of Eureka shall place in said Fund from any suitable funds available a sum not less than the amount contributed each month by each member of said Fire or Police Department. . . . That any contributions made, either by gift, devise or from any other source, for the purpose of adding to such Firemen's and Policemen's Retirement Fund, shall be received and placed therein without any deductions from the salaries of the members of either Department or contribution by the City of Eureka to match the same. That said Fund shall not be used for any other purpose than as herein provided and cannot be transferred to any other Fund."

Section 11 provides: "That in the event there shall not be sufficient moneys in the Fund to pay the amounts in this Ordinance provided by the donations, contributions, the deductions from the salaries of the members of the Departments and the contributions by the City of Eureka, then the amount of deductions from the salaries of the members to be placed in said Fund may be increased by a majority vote of the members of the Fire Department, Police Department and Council of the City of Eureka, to be matched by a similar increase by the City of Eureka. Each Department shall hold a secret vote separate from the other, and the City Council shall vote separate from either Department. The increase to be effective must have a majority vote in each Department and in the Council. If no increase is voted and there shall not be sufficient moneys in the Fund to make the payments herein provided, then such payments shall be reduced pro rata to an amount payments can be made from the Fund. That said pro rata reduction in the pensions or payments herein provided can only be made by a majority vote of the members of each Department and the City Council and only in an amount agreed upon by said three Departments. Each shall hold separate [votes]."

Section 12 provides that if a member is permanently separated from the service and not entitled to retirement benefits under the ordinance, "then all moneys theretofore paid into such Fund, by such member, shall be returned to such member, if alive; otherwise, to his widow, if any, and if there be no widow, then to his child or children, if any, and if there be no widow or children, then to his parents, and if there be no parents, then to his heirs at law. . . ."

Section 14 provides that the Retirement Commission may direct the City Treasurer to deposit surplus funds in a bank to draw interest for

the benefit of the retirement fund, and further declares that "it shall be the duty of the Commission to find and establish what are surplus funds and what amount is necessary to be kept in the Fund for current expenditures."

Section 16 governs amendment of the ordinance.

Section 17 provides that other municipal employees may be included in the retirement system "only by a majority vote of such other Municipal Departments or employees of other Municipalities by *a vote held in accordance with Chapter 321 of the Statutes of 1937, as amended by Chapter 1080 of the Statutes of 1941, and as may be amended by other Acts of the Legislature in effect at the time such proposal is made*, and by a secret ballot of the members of the Fire and Police Department by a majority vote thereof, and a majority vote by the Council of the City of Eureka. . . ." (Italics added.)

Section 19 provides: "It is the intent and purpose that *each person entitled to the benefits of this Ordinance has a property interest* therein *for purposes of withdrawal*, as provided, *and an estate to his dependents and heirs* in a sum equivalent to the amount he shall have contributed, plus a reasonable rate of interest, less any deductions provided, *and for disability and retirement payments to the full extent of the provisions herein.*" (Italics added.)

1. *Adoption of the Ordinance Pursuant to the State Pension Act.*

(1a) Three resolutions of the city council and an ordinance adopted by that council providing for submitting the pension ordinance to the electorate mention the State Pension Act. Resolution No. 3339, adopted May 4, 1943, states in its title, "Establishing a Retirement Fund in Accordance with Chapter 321 of the Statutes of 1937 as amended by Chapter 1080 of the Statutes of 1941." The only other reference to the state act in the resolution is as follows: "Whereas, under and by virtue of Chapter 1080 of the Statutes of 1941, before said proposed Ordinance can be presented for passage, a vote by secret ballot must be taken by the members of each Department separate from the other for their approval or disapproval of such retirement proposal."

Resolution No. 3341, adopted on May 10, 1943, declaring that an ordinance should be drafted to be placed on the ballot at the general municipal election to be held June 21, 1943, contains only the following reference (in addition to that made in the title) to the state act: "Whereas, in accordance with the Statute in such case made and provided, the proposed Ordinance was submitted to the Eureka Paid Fire Department for a vote thereon and to the Eureka Paid Police [*342] Department for their vote thereon, by Resolution No. 3339, . . ."

Ordinance No. 2256, adopted on May 18, 1943, provides for a general municipal election submitting to the electorate an ordinance establishing a contributory retirement system for members of the police and fire departments. The only reference to the state act in this ordinance is as follows: "That the General Laws of the State of California, Chapter 321 of the Statutes of 1937, as amended by Chapter 1080 of the Statutes of 1941, provides that Ordinances may be passed by Incorporated Cities, either by the Council by a two-thirds majority vote or by a majority vote of the Electorate of the City, for the establishment of a Retirement and Pension System . . . . That in accordance with such General Laws, an Ordinance was proposed to carry into effect the provisions thereof for the Eureka Paid Fire Department and Eureka Paid Police Department. That after said Ordinance had been proposed, Resolution No. 3339 was duly passed . . . the proposed Ordinance . . . establishing a Retirement Fund for the members of the Eureka Paid Fire Department and the members of the Eureka Paid Police Department in accordance with Chapter 321 of the Statutes of 1937, as amended by Chapter 1080 of the Statutes of 1941." (§ 3.)

Finally, Resolution No. 3348, which declares the pension ordinance to be the law of Eureka, does not mention the State Pension Act. [2]

2 The resolution declares: "That it is hereby found that said proposed ordinance appearing on the ballot in the following manner 'Shall the proposed Ordinance to establish a contributory retirement system for the members of the Eureka Paid Fire Department and the Eureka Paid Police Department, creating a Commission to be known as "The Firemen's and Policemen's Retirement Fund Commission" providing necessary funds to establish and maintain said Retirement System; providing for the payment to Firemen and Policemen from the Funds; establishing rules and regulations for the collection and disbursement of said funds; providing the means for amendment of the ordinance and providing for the method of participation by other Municipal employees of the City of Eureka and other Municipalities in funds and contributions to be made in such case, become a law of the City of Eureka?' received a majority of affirmative vote . . . and the same is hereby declared to be the law of the City of Eureka . . . ."

[**715] [***139] The ordinance "Establishing a Contributory Retirement System for Members of the Fire Department and Police Department of the City of Eureka" does not mention the State Pension Act in its title or in any of its substantive provisions, many of which differ from the state act. [3] The ordinance mentions [*343] the state act only in [**716] [***140] section 17, which governs the extension of the pension plan to other municipal employees. (See fn. 1, *supra*.)

3 Section 1 of the State Pension Act (as amended in 1941) provides: "Any city within this State is hereby authorized to adopt by ordinance a retirement or pension system for its officers and employees and provide for the payment of retirement allowances, pensions, disability payments and death benefits, or any of them. Said ordinance shall provide for the appointment of a retirement board and for the delegation to such board of such powers and duties in relation to such system as be deemed advisable to carry out the intent and purpose of this act. The ordinance adopting a retirement or pension system may be adopted either by a majority vote of the electorate of the city or by approval of a two-thirds majority of the governing body of such city. In either case of adoption said ordinance can not be repealed except by a vote of the electorate.

"*It is intended by the provisions of this act to enable any city within this State to adopt such a retirement system as may be adaptable to the size and type of city involved.*" (Italics added.) (Stats. 1941, ch. 1080, p. 2778; see *Gov. Code, §§ 45300, 45301, 45306.*)

Section 2 provides that the city council shall adopt a resolution which gives notice of intention to adopt a pension ordinance and summarizes the provisions of the proposed ordinance. It further requires a vote by secret ballot and majority approval by any group of employees proposed to be covered. (Stats. 1941, ch. 1080, p. 2778; see *Gov. Code, §§ 45302- 45305.*)

Section 3 provides that the ordinance establishing the pension or retirement system "shall, among other things, provide for the following:

"(a) The amount of benefits to be paid to any officers or employees, or their beneficiaries, and the terms and conditions upon which such benefits shall be paid.

"(b) The contribution to be paid by such officer or employee to the pension and retirement fund.

"(c) The contribution to be paid by the city to the pension and retirement fund, which, exclusive of contributions paid on account of service rendered prior to the effective date of the ordinance, shall not exceed the total contribution paid to the pension and retirement fund by the officers and employees.

"(d) The personnel of the retirement board, which shall consist of not less than five members, at least two members of which shall be elected by the officers and employees who have been included in such retirement system.

"(e) The adoption of rules and regulations for the administration of such a retirement or pension system by the retirement board.

"(f) The refunding to any officer or employee who withdraws from the retirement system, prior to retirement, of the amount of such officer's or employee's contribution, with such interest as may have been credited to his contribution." (Stats. 1941, ch. 1080, p. 2779; see *Gov. Code, § 45309.*)

Section 4 provides that the amount of the pension may be predicated on the services rendered to the city by the employee prior to adoption of the plan and further provides that employee contributions to the fund may be made by deductions from salary. (Stats. 1937, ch. 321, p. 701; see *Gov. Code, § 45310.*)

Section 5 declares that nothing in the act prohibits enhancement of the fund by private or voluntary contributions or transfers to the fund by the city of surplus municipal funds. (Stats. 1937, ch. 321, p. 701; see *Gov. Code, § 45312.*)

Section 6 provides that the city may levy annually a special tax "to provide sufficient revenue to meet the obligation of the city to the said pension and retirement fund as defined and limited by subdivision (c) of section 3 hereof; which said rate of taxation may be in addition to the annual rate of taxation allowed by law to be levied in said city." (Stats. 1937, ch. 321, p. 701; see *Gov. Code, § 45311.*)

Section 7 requires the retirement board to require competent medical proof before retiring an employee for disability, and further provides for reduced pension payments upon proof of diminished disability. (Stats. 1937, ch. 321, p. 701; see *Gov. Code, §§ 45313- 45315.*)

Section 8 provides: "This act shall not be deemed to repeal any existing acts under which

> pension or retirement systems may have been heretofore adopted, but is intended to be and is an enabling act providing an alternative procedure for the establishment of pension and retirement systems. Any regularly established fire or police protection district is hereby authorized to adopt a pension or retirement system for its employees under the provisions of this enabling act." (Stats. 1937, ch. 321, pp. 701-702; see *Gov. Code, §§ 45316, 45317.*)

The only section of the ordinance mentioning the state act [*344] thus merely adopts the procedure established by the act for the inclusion of municipal employees into a contributory pension and retirement plan. (See § 2 of the *State Pension Act, supra, fn. 3.*) Resolution No. 3339, declaring the proposed pension ordinance, follows the notice requirement of section 2 of the act. (See fn. 3, *supra.*) And Resolution No. 3341, which declares that a pension ordinance should be drafted and placed on the ballot, and Ordinance No. 2256, which provides for the election, follow the requirement in section 1 of the act that the pension system be adopted by a majority vote of the electorate. (See fn. 3, *supra.*)

The substantive provisions of the pension ordinance, on the other hand, vary from those of the state act. Section 7 of the ordinance gives to the surviving widow, children, or other heirs of a member of the fire or police department who died from a cause unconnected with his employment, a right to part of the contributions of the decedent plus interest. The State Pension Act contains no corresponding provision.

Section 10 of the ordinance requires the City to contribute a sum "not less than" that contributed by the employees, while section 3, subdivision (c), of the state act provides that the City's mandatory contribution to the fund "shall not exceed" that contributed by the employees. And more importantly, section 11 of the ordinance, which has no corresponding provision in the state act, provides that in case of insufficient pension funds, employee contributions can be increased and/or pension payments pro rata decreased only by majority vote of the employees. The state act, on the other hand, is completely silent on the effects of insufficient pension funds.

Finally, section 19 of the ordinance, which has no corresponding section in the state act, vests a "property interest" in each person entitled to the benefits of the ordinance, "for [*345] the purposes of withdrawal, . . . an estate to his dependents and heirs in a sum equivalent to the amount he shall have contributed, . . . and *for disability and retirement payments to the full extent of the provisions herein.*" (Italics added.)

Reading section 3 of the ordinance, which provides that those entitled to retirement pensions "shall" receive a pension equal to one-half of the salary attached to the rank held for one year preceding retirement, together with sections 10, 11, and 19, one can conclude only that a person entitled to retirement or disability benefits under the ordinance, as well as any beneficiary of the employee, is entitled to the amount specified in the ordinance regardless of the amount in the fund. Therefore, either the city owes a continuing obligation to contribute to the fund those amounts adequate to fulfill current and future claims under the ordinance, or the city bears a general liability under the ordinance unlimited by its statutory obligation to make contributions to the pension fund. Of course, either alternative equally protects the member of the pension plan (and his potential beneficiaries), and both are in line with "the well-recognized rule that all pension laws are liberally construed to carry out their beneficient policy." (*England v. City of Long Beach (1945) 27 Cal.2d 343, 346-347 [163 P.2d 865]*; *Wendland v. City of Alameda (1956) 46 Cal.2d 786, 791 [298 P. 863]*; *Dillard v. City of Los Angeles (1942) 20 Cal.2d 599, 602 [127 P.2d 917]*; *Klench v. Board of Pension Fund Comrs. (1926) 79 Cal.App. 171, 187 [249 P. 46].*)

(2) Charter cities which possess complete power over municipal affairs may adopt part of a general law in an ordinance governing a municipal affair without thereby [**717] [***141] being bound by all the provisions of that general law. (*City of Redondo Beach v. Taxpayers, Property Owners, etc. City of Redondo Beach (1960) 54 Cal.2d 126, 137 [5 Cal.Rptr. 10, 352 P.2d 170]*; *City of Santa Monica v. Grubb (1966) 245 Cal.App.2d 718, 723-726 [54 Cal.Rptr. 210]*; cf. *Mullins v. Henderson (1946) 75 Cal.App.2d 117, 130 [170 P.2d 118]*: "none of [the cases involving charters expressly incorporating general laws] hold that a reference to a general law for one express purpose also incorporates the law in any other respect.") The City here agrees that establishment of an employee pension plan is a municipal affair.

"In 1917, the city of Eureka availed itself of the privilege given to it by the [1914] amendments of sections 6 and 8 of the [California] constitution, . . . and amended section 22 of [*346] article III of its freeholders' charter to provide that thereafter the city should 'have the power to make and enforce any and all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter as the same now is or may be hereafter amended; . . . *and no enumeration or specific statement herein of any particular powers shall be held to be exclusive or a limitation of the foregoing general grant of powers.*' (Stats. 1917, p. 1743.) By this amendment to its charter the city brought itself within the conditions of the amendments of 1914 to sections 6 and 8 of article XI of the constitution.

Thereupon, according to the terms of those sections, its powers over municipal affairs became all-embracing, restricted and limited by the charter only. The result is that the city has become *independent of control by general laws upon municipal affairs.* [Citation.]" (Italics added.) (*Sunter v. Fraser (1924) 194 Cal. 337, 343 [228 P. 660].*)

(3) Chartered cities have full power to regulate municipal affairs, and ordinances governing municipal affairs supersede general laws insofar as the latter conflict with the ordinance unless the state has preempted the field. (See *In re Hubbard (1964) 62 Cal.2d 119, 128 [41 Cal.Rptr. 393, 396 P.2d 809]*; 5 McQuillin, Municipal Corporations (3d ed. 1949) § 15.20, at p. 98; 6 McQuillin, *op.cit. supra*, § 21.33, at pp. 244-246.) **(4)** The State Pension Act by its own terms makes clear that its provisions are not intended to preempt the field of pensions for municipal employees. (See section 1, *supra*, fn. 3; cf. *Grace v. City of Los Angeles (1967) 249 Cal.App.2d 577, 584 [58 Cal.Rptr. 388].*)

(5) The City contends, however, that because its charter contains no express provision relating to pension plans the City was required to incorporate all of the State Pension Act. The City's contention rests on *Blake v. City of Eureka (1927) 201 Cal. 643 [258 P. 945]*, a decision which conflicts with the purpose of the 1914 amendment to the California Constitution and the general case law on the power of charter cities. We therefore now overrule *Blake.*

Blake held (*201 Cal. at p. 657*) that a section of the charter adopted in 1895 (Stats. 1895, p. 403), which provided that all matters not provided for in the charter shall be conducted pursuant to applicable general laws, governed over section 22 of the charter, adopted in 1917, which provided that the City shall have the power to make all laws governing municipal affairs regardless of the lack of any specific enumeration of [*347] power in the charter. (See *Sunter v. Fraser, supra, 194 Cal. 337, at p. 343.*) [4] *Blake's* [**718] [***142] holding ignores the purpose of the section added to the charter in 1895, as well as the 1914 amendment of the California Constitution which removed the necessity for enumeration of powers in the charter with respect to municipal affairs. (See generally, Graybiel, *Review of Recent California Decisions on Municipal Law* (1923) 11 Cal.L.Rev. 73, 91.) The 1895 provision merely restated "the opinion then prevailing that a city charter must contain a specific grant of power with reference to its conduct of municipal affairs." (*West Coast Advertising Co. v. City & County of San Francisco (1939) 14 Cal.2d 516, 519 [95 P.2d 138].*) **(6)** The purpose of the 1914 constitutional amendment was to free cities which availed themselves of "home rule" of the control of general laws in the area of municipal affairs and to give them complete control over such matters whether or not their charter expressly enumerated a power over the municipal affair in question. (See *West Coast Advertising Co. v. City & County of San Francisco, supra, 14 Cal.2d at p. 521*; *City of Pasadena v. Charleville (1932) 215 Cal. 384, 388-389 [10 P.2d 745].*)

4 The City incorrectly contends that the 1895 charter provision was amended in 1965 to remove the limitation with respect to municipal affairs. The section as amended in 1965 (Stats. 1965, p. 5307) does not mention municipal affairs. It provides: "The City shall have the power to and *may* act pursuant to any procedure established by any law of the State, *unless* a different procedure is required by this Chapter." (Italics added.)

City of San Jose v. Lynch (1935) 4 Cal.2d 760 [52 P.2d 919], refused to adopt the reasoning underlying *Blake* and therefore in effect overruled *Blake.* In *Lynch*, the City of San Jose, which adopted a "home rule" provision in 1934, argued that an improvement procedure ordinance was invalid because it conflicted with the State Improvement Act of 1911. The City urged that a 1915 charter provision, which required that general laws in force at the time would govern improvement procedures, constituted a charter limitation upon the City's power over municipal affairs and remained effective after the adoption of "home rule" in 1934. We rejected this contention, stating that the 1934 amendment of the charter "is general in that it is intended as an amendment of the entire charter, rather than amending separately each section relating to matters of purely municipal character. It must therefore be construed as having the effect of causing [the 1915 provision] to provide for the governing of special assessment street [*348] improvements by general law [unless a different procedure was provided] at the time of the improvement in the charter *or by ordinance.*" (Italics added.) (*4 Cal.2d at pp. 765-766.*)

(1b) The 1917 amendment of the Eureka Charter similarly was intended as an amendment of the entire charter. (See Stats. 1917, ch. 12, at pp. 1742-1743.) And a new provision vesting complete control over municipal affairs in the city (Stats. 1917, ch. 12, § 22, pp. 1743-1744) specifically declares that enumeration of the power in the charter is not necessary to remove a municipal affair from the control of general law. **(7)** Section 22 must therefore be read as amending the 1895 provision to declare that general laws control with respect to municipal affairs unless the city by charter amendment *or passage of an ordinance* exercises its power acquired by adoption of "home rule" in 1914. (Cf. *City of San Jose v. Lynch, supra, 4 Cal.2d 760, 765-766*, overruling *Blake v. City of Eureka, supra, 201 Cal. 643.*) **(1c)** We are therefore not obligated to construe the pension ordinance

in light of the State Pension Act, but rather must construe the state act in light of its incorporation (whether it be partial or whole) into an ordinance governing a municipal affair adopted by a city with "all-embracing" power over municipal affairs. (See *Sunter v. Fraser, supra, 194 Cal. 337, 343.*)

2. *Construction of the State Pension Act in Light of its Incorporation into an Ordinance Adopted by a Charter City on the Question of the City's Liability.*

(8a) Even assuming that the pension ordinance incorporates the substantive as well as the procedural provisions of the State Pension Act, the question whether the City's liability is limited by the pension fund under the act as incorporated into the ordinance must be determined pursuant to the well-established rule of liberal construction of municipal pension plans. Applying that [**719] [***143] rule here, we hold that the pension payments directed to be made by section 3 of the pension ordinance (see fn. 1, *supra*) constitute general obligations of the City and are not limited in amount by the sums assigned to the pension fund by section 10 of the ordinance or section 3 of the State Pension Act. (Cf. *England v. City of Long Beach, supra, 27 Cal.2d 343, 346-347*; *Eaton v. City of Los Angeles (1962) 201 Cal.App.2d 326, 332-333 [20 Cal.Rptr. 456]*; 3 McQuillin, *op.cit. supra*, § 12.145, at p. 614.)

As previously discussed, section 3 of the ordinance provides that a member of the fire or police department, upon becoming eligible for retirement, "shall be paid" a yearly pension. [*349] Section 11 of the ordinance declares that the commission may not make pro rata reductions of pension payments unless a majority of each department by secret ballot votes approval of such reduction. Section 11, moreover, provides that the City may not increase the amount of salary deductions for the pension fund unless similar majority approval is received. Sections 3 and 11 together therefore mean that in the event the members do not vote for increased salary deductions or pro rata decreased pension payments, the City must provide the necessary sums to pay the pensions and other benefits provided for by the ordinance. Section 19 of the ordinance substantiates the propriety of this construction. Section 19 vests a "property interest" in each person entitled to the benefits of the plan "for purposes of withdrawal, . . . an estate to his dependents and heirs in a sum equivalent to the amount he shall have contributed, plus a reasonable rate of interest, less any deductions provided, and for disability and retirement payments to the full extent of the provisions herein." (See also sections 7 and 14, *supra*, fn. 1.)

The provision in section 3 of the ordinance that the pension payments "shall be paid from such Fund," and the specifications of the amount the City is required to pay into that fund in section 10 of the ordinance and section 3 of the State Pension Act (assuming its total incorporation into the ordinance) do not require a construction of the pension plan different from the above interpretation which imposes upon the City a general obligation to make the payments specified in section 3 of the ordinance.

In *England v. City of Long Beach, supra, 27 Cal.2d at page 346*, the charter "provided that the city manager 'shall include in his annual budget an amount equal to two per cent of the estimated pay of the members of the police and fire departments, . . . and the city council shall appropriate such amount to the "Relief and Pension Fund."' It also provided: 'There shall be paid into the said fund, . . . (b) The amount appropriated by the city council, . . .'" The charter further "provided that after twenty years' service a fireman, upon his application, '*shall be retired and paid* in equal monthly installments *from said fund* a limited pension' of fifty per cent of his annual salary, . . ." (*27 Cal.2d at p. 347.*)

The provision that the member eligible for retirement "shall be retired and paid . . . from such fund" a certain pension and the provision that "the amount appropriated by [*350] the city council" "shall be paid into the said fund" are strikingly similar, respectively, to section 3 of the pension ordinance, on the one hand, and section 3 of the State Pension Act and section 10 of the ordinance, on the other. Our construction of the appropriation and payment of pension provisions of the charter in *England* therefore applies equally to the analogous provisions of the pension ordinance and State Pension Act (as incorporated into the ordinance) in the instant case.

As we said in *England*, the language of these provisions, together with other provisions of the pension ordinance (e.g., § 19) "may reasonably be interpreted to mean that a retiring fireman [or policeman] is entitled to a pension of the amount designated; that it was intended to provide an outright, unqualified pension; and that the [**720] [***144] words 'from said fund,' together with the provisions of subdivision [(c) of section 3 of the State Pension Act and section 10 of the pension ordinance which assumedly incorporates it], were not intended as a qualification or limitation but that the pension fund was created, and payments ordered made therefrom, simply as an orderly and customary means of administering city moneys." (*27 Cal.2d at p. 347.*) Moreover, here, as in *England*, there is no language in either the State Pension Act or the pension ordinance "which expressly [limits] pension payments to the money in the pension fund or the particular items mentioned as sources of income to the fund . . . ." (*27 Cal.2d at p. 347.*) And finally, as we did in *England*, we must reject any argument "that if a general obligation had been intended, the voters would

have stated specifically that the city should levy a tax sufficient to cover all pension payments. It may be argued with equal force . . . that the voters could, but did not, specify that payments must be made from the pension fund alone." (*27 Cal.2d at p. 347.*)

The rationale underlying the rule of construction in *England* -- that the City's liability for pension payments is not limited to the pension fund unless the pension plan clearly specifies that limitation -- and the general rule that pension plans be liberally construed to promote their beneficent purpose (see e.g., *Dillard v. City of Los Angeles, supra, 20 Cal.2d 599, at p. 602*) rests on the same duty of fair dealing and obligation to protect the reasonable expectations of those whose reliance is induced that underlie the rules of construction in favor of the insured in insurance cases and in favor of the party of reduced bargaining power in cases involving [*351] other standardized contracts. (See, e.g., *Gray v. Zurich Ins. Co. (1966) 65 Cal.2d 263, 269-271 [54 Cal.Rptr. 105, 419 P.2d 168]*, and cases and authorities cited therein.)

(9) The pension provisions of a city charter or ordinance form an integral part of the employment contract. (*Kern v. City of Long Beach (1947) 29 Cal.2d 848, 852*; *Dryden v. Board of Pension Comrs. (1936) 6 Cal.2d 575, 579 [59 P.2d 104]*.) One purpose of providing pensions for municipal officers is to induce them to enter and continue in the service of the city. Another is to provide sufficient subsistence for retired or disabled officers (or their dependents) who have performed their obligations under the employment contract. (See *Klench v. Board of Pension Fund Comrs., supra, 79 Cal.App. 171, 189.*) Therefore, when the ordinance establishing the pension plan can reasonably be construed to guarantee full payment to those entitled to its benefits regardless of the amount in the fund established by the pension plan, then "we are, of course, required to construe the provisions liberally in favor of the applicant so as to carry out their beneficient policy." (*Wendland v. City of Alameda, supra, 46 Cal.2d 786, 791*; *Dillard v. City of Los Angeles, supra, 20 Cal.2d 599, 602.*)

As we explained in *England*, "We must . . . reject any theory that the provisions of the [ordinance] were designed to create an appearance of granting pensions while at the same time withholding the benefits by providing inadequate funds. (Cf. *Gibson* v. *City of San Diego* [(1945)] *25 Cal.2d 930, 935 [156 P.2d 737]*. . . .) The insufficiency of the fund may have resulted simply from a mistaken belief that the fund would be adequate or from an intent that it should constitute but a partial source of pension payments with the balance to be made up out of the city's general revenues.

"The injustice that would prevail if the provisions relating to the fund were construed to be a limitation on the obligation to pay pensions is apparent. The existence of a pension plan is, of course, a strong factor inducing persons to enter into or remain in a particular employment. Moreover, the [employees] involved here [were] required [**721] [***145] to contribute a portion of [their] salary to the pension fund. Although provision was made for substantial pensions, the inadequacy of the provisions for maintenance of the pension fund was not apparent from the face of the [state statute or ordinance]. As before noted, [neither the state act nor the ordinance] expressly [limits] the obligation of the city to the payment of the pensions [*352] from the pension fund. It obviously would be unjust to make the payment of pensions dependent upon the solvency of a particular fund, thereby depriving employees of the benefits of the system, *unless we* [*are*] *compelled to do so by a clear, positive command in the* [*act or ordinance*]." (Italics added.) (*27 Cal.2d at p. 348.*)

(10) We conclude that a charter city, possessed of plenary power to adopt a pension system imposing upon it a general obligation, cannot escape liability for those pension payments which it has led its employees reasonably to expect. In this respect it is no different than any other employer or public service institution which induces reliance upon a contract which may reasonably be interpreted to afford that protection which has been impliedly promised. **(8b)** We recognize that the City will not be so obligated if the pension plan which it adopts, either in the ordinance itself or the statutory scheme which it incorporates, clearly and explicitly limits its liability to the fund which the pension plan establishes. In the absence of such a limitation, and especially here, in light of the provisions that provide that an employee eligible for retirement or disability pay "shall" receive a certain amount, that vest the beneficiaries of the pension plan with a "property interest" in the fund for purposes of withdrawal and receipt of payments, and that declare that pension payments shall not be reduced without the majority approval of both departments, we must conclude that the City of Eureka bears a general obligation under the pension ordinance.

The judgment is affirmed.

DISSENT BY: BURKE

DISSENT

BURKE, J. I dissent. At the outset it should be noted that no question is presented in this case of failure to pay a pension to any member of the fire or police departments of defendant City. Instead, the case stems from a report of professional actuaries that as of October 31, 1964, the retirement fund established by Ordinance 2262 (pension ordinance) had an unfunded liability of some $ 2,742,899, not covered by total assets of $

445,677.51. The controversy concededly relates only to the interpretation to be placed on the pension ordinance in determining the sources from which the pensions therein provided are to be financed. I am convinced that any objective view of the law and the facts compels the conclusion that under the express limitations of the ordinance and of the [*353] state statute (Pension Act) pursuant to which it was enacted, the City can be required to do no more than match the contributions of the employee members to the retirement fund. That this was also the intent and the understanding of the fire and police departments, who sponsored the pension ordinance and whose prior approval is (by the terms of the ordinance itself) required before the ordinance can be amended by the city council, is demonstrated by the approval given by the members of those departments to a 1959 amendment which *increased* their own required contributions to the retirement fund.

The ordinance, No. 2262, was enacted by vote of the people of defendant City in 1943. It contains relevant provisions not mentioned by the majority opinion and which will be more fully discussed, including the section (§ 16; see fn. 8, *post*) permitting amendment of the ordinance by the city council only after prior approval by the firemen and policemen. In 1948 and 1959 the ordinance was so amended.

As the majority opinion notes, the parties have *stipulated* that the people adopted the ordinance pursuant to the authority of a specified state law. ("Chapter 321 of the Statutes of 1937, as amended by Chapter [**722] [***146] 1080 of Statutes of 1941 [Pension Act], [1] to which statutes reference is made in section 17 of said ordinance. . . .") To my mind, the three city council resolutions which preceded the adoption of the pension plan and an ordinance (No. 2256) adopted by the council giving effect to the plan, discussed by the majority, demonstrate unequivocally that the pension ordinance *was* adopted under and pursuant to the authority of the Pension Act, and support the stipulation of the parties to that effect. [2] Further, such [*354] resolutions and Ordinance 2256 disclose that in adopting the pension ordinance the City followed *every procedural step* laid down *in the Pension Act*; the pension ordinance itself includes *every mandatory provision* required by the Pension Act; and none of the other provisions of the pension ordinance violates any requirement or specification of that act. The Pension Act obviously does not purport to set forth in toto every provision which an ordinance adopted under it shall contain, but the act *does* lay down certain requirements and limitations, with *each of which* the pension ordinance here in issue complied. Additionally, the record shows that the City's firemen and policemen actively participated in drafting the pension ordinance. [3] This fact, plus provisions of the Pension Act and of the ordinance, hereinafter pointed out, making the adoption, enlargement, and amendment of the fire and police retirement system of the City subject to the prior approval of the members of those departments, leaves no room in this case for the blind application of the general principle of liberal construction of pension laws, here espoused by the majority, to impose upon the City, which means upon its taxpayers, an unlimited and continuing obligation in contravention of the provisions of the Pension Act [**723] [***147] and of the pension ordinance, taken either singly or together.

1 Those statutes were codified in 1949 (Stats. 1949, ch. 79, p. 249) as article 1 (commencing with *§ 45300*) of chapter 2 of division 5 of title 4 of the Government Code. However, in this opinion all references will be to the statutes and the sections thereof as they existed when Ordinance 2262 was adopted in 1943.

2 Resolution No. 3339, adopted May 4, 1943, contains in its title and in the body of the resolution a declaration that the proposed ordinance is for the purpose of establishing a retirement fund for the city policemen and firemen in accordance with the 1937 Pension Act. The resolution then recites that under the Pension Act, before the proposed ordinance can be presented for passage, a vote by secret ballot must be taken by the members of each such department separate from the other for their approval or disapproval of such retirement proposal, and then proceeds to make provision for submitting the proposed ordinance to the firemen and policemen for their secret ballot.

Resolution No. 3341, adopted by the city council on May 10, 1943, declares the results of the elections held in the two departments pursuant to the 1937 Pension Act and of the vote of the council on the proposed pension ordinance, and orders an ordinance to be drafted to place the proposal on the ballot at the general municipal election to be held on June 21, 1943.

Ordinance 2256, adopted on May 18, 1943, likewise relates that the pension ordinance was being proposed in accordance with the Pension Act and directs that the proposed pension ordinance be submitted to the electorate at the general election to be held June 21, 1943.

Resolution No. 3348, adopted June 29, 1943, declares in pertinent part that the proposed pension ordinance was voted upon at the June 21, 1943, general election and carried by a vote of 2991 to 830.

3 The minutes of a city council meeting held March 16, 1943, relate that "A letter from the Chief of Police and a letter from the Fire Department and the proposed ordinance regarding the creation of a retirement fund . . . were read and discussed. Mr. Leo Schussman, representing the Firemen, stated that the firemen had studied this proposition for over a year and had obtained ordinances from many other cities, and that the ordinance presented was made up from the favorable parts of all of these other ordinances. The plan, he stated, would go into effect for first payments at the end of five years. . . . Councilman Franceschi moved and Councilman Berry seconded that the matter be referred to the Committee of the Whole to meet with a committee from the Fire and Police Departments, the date to be set by the President of the Council. The motion carried. . . ."

As noted in *Klench v. Board of Pension Fund Comrs. (1926) 79 Cal.App. 171, 187 [249 P. 46]*, cited by the majority, "Of course, these rules of statutory construction, as applied to pension laws, are of no consequence where the [*355] language itself of the statute is sufficiently clear or free from obscurity as to reasonably remove all doubt as to its meaning or the legislative intent with respect thereto." Both the Pension Act and the pension ordinance of defendant City are so clear as to remove doubt as to their meaning and the legislative intent of the legislators and the people who enacted them, and each of such enactments plainly limits the City's pension liability to that of matching the pension fund contributions of the members of its police and fire departments.

Limitation on Liability Under Pension Act

The Pension Act provides an alternative procedure [4] by which "Any city within this State" is "authorized to adopt by ordinance a retirement or pension system for its officers and employees . . ." upon "a majority vote of the electorate of the city or by approval of a two-thirds majority of the governing body of such city." (§ 1.) City employees are divided into three groups (firemen, policemen, others), and no group can be included in the retirement system unless a majority of the members thereof have expressed by secret ballot their approval of the proposed system. (§ 2.)

4 Pension Act, section 8: "This act shall not be deemed to repeal any existing acts under which pension or retirement systems may have been heretofore adopted, but is intended to be and is an enabling act providing an alternative procedure for the establishment of [such] systems. . . ."

Section 3 of the Pension Act directs that the ordinance establishing the system shall provide for various matters, including inter alia "(a) The amount of benefits" and the terms and conditions of payment thereof," (b) The contribution to be paid" to the retirement fund by each covered employee, and "(c) The *contribution* to be *paid by the city* to the pension and retirement fund, *which . . . shall not exceed the total contribution* paid to the . . . fund *by the . . . employees*." (Italics added.)

Ordinance 2262 does provide for the amount of benefits (§§ 3, 4, etc.) and for the contribution to be paid to the fund by each employee (§ 10). It further provides (§ 10) that the City shall place in the fund "*not less than* the amount contributed" by the employees. [5] (Italics added.)

5 As originally enacted, section 10 provided that the contribution of each employee should be *5 percent* of his regular monthly salary. *By* 1959 *amendment*, after prior approval of the employees, this contribution was *increased to 7 percent*, thereby automatically increasing by a like amount the City's required contributions.

Inasmuch as the City adopted Ordinance 2262 under and [*356] pursuant to the authority of the Pension Act, the City is bound by the provisions of that act. (See *Klench v. Board of Pension Fund Comrs., supra, 79 Cal.App. 171, 177, 180.*) Moreover, the requirement found in section 10 of the ordinance that the City contribute "*not less* than the amount contributed each month by each member" (italics added) comports with the requirement of section 3, subdivision (c), of the Pension Act that the City's contribution shall, conversely, be *not more* than the total contributions of the employees. The voters by their approval of the ordinance thus expressed their willingness that the City make the maximum regular contribution to the pension and retirement fund which is permitted under subdivision (c) of section 3 of the Pension Act. [6] In this connection it should be noted that under section 6 of the Pension Act the City "may levy and [**724] [***148] collect annually" a special property tax "to meet the obligation of the city to the said pension and retirement fund *as defined and limited by subdivision (c) of section 3* hereof; which said rate of taxation may be in addition to the annual rate . . . allowed by law to be levied in said city." (Italics added.)

6 As noted in footnote 3, *ante*, the firemen and policemen of defendant City actively participated in drafting the pension ordinance, and accordingly may fairly be credited with the section 10 provision that the City's regular contribution

should be the maximum permissible under the Pension Act pursuant to which the ordinance was adopted.

Further, under section 5 of the Pension Act the City is permitted to "enhance" the retirement fund over and beyond the required contributions, by transferring to such fund "any surplus funds of said municipality which in the sound discretion of said legislative body may properly be used for such purpose." However, by reason of the maximum imposed by the Pension Act on *required* contributions, the City cannot be compelled to contribute more.

The majority opinion (*ante*, pp. 345-348) undertakes at great length to discuss the powers of "home rule" cities such as defendant City of Eureka, and to overrule this court's opinion in *Blake v. City of Eureka (1927) 201 Cal. 643 [258 P. 945]*, with respect to the scope and effect of section 191 of the City's charter as it existed at the times here involved. [7] [*357] Without here undertaking to detail the unsoundness of the majority's reasoning, it is appropriate to emphasize that since the City in actuality did proceed under general state law as found in the Pension Act here involved, there is no occasion to consider whether attempted enactment of a retirement and pension ordinance in disregard of general law would have fallen afoul of former section 191 of the charter.

7 Charter section 191: "All improvements, actions, proceedings, matters and things not otherwise provided for in this charter *shall* be taken, had, and conducted under and in pursuance of the provisions of the laws of the State of California applicable thereto, in force at the time such improvements [etc.] are taken and had." (Italics added; Stats. 1895, p. 403.)

In 1959 the City adopted a new charter which carried over and incorporated as section 912 the provisions of section 191 of the 1895 charter. (Stats. 1959, pp. 5604, 5622.) In 1965 section 912 of the 1959 charter was amended to read: "Procedures. The City shall have the power to and *may* act pursuant to any procedure established by any law of the State, unless a different procedure is required by this Charter." (Italics added; Stats. 1965, p. 5307.)

Thus, by the 1965 change of the word "shall" to the word "may," in section 912, the former limitations imposed by the charter itself upon the City's power with respect to matters of municipal concern were removed. The statement to the contrary in the majority opinion (fn. 4 thereof) demonstrates a basic misunderstanding of the charter provisions.

City's Liability as Expressed in Ordinance 2262

Additionally and in any event the terms of Ordinance 2262 themselves limit the City's liability to that of matching the contributions of its covered fire and police employees. A limitation on a city's obligation to contribute to a pension fund is, of course, valid and will be given effect. (*Houghton v. City of Long Beach (1958) 164 Cal.App.2d 298, 303-305* [1] *[330 P.2d 918]*.)

In construing Ordinance 2262, it should be recalled at the outset that the general state law (Pension Act) pursuant to which it was enacted, specifies in section 2 that the retirement and pension system established by the ordinance could include no group of City employees (firemen, policemen, others) which had not previously approved the system. As noted hereinabove (see fn. 2, *ante*), the firemen and policemen of defendant City by secret ballot did approve the system.

Further, Ordinance 2262, which establishes a retirement system for *only* the police and fire departments of defendant City, who had expressed their required advance approval, itself provides (§ 17) that other municipal employees may be included in the system "only by a majority vote of such other" employees "held in accordance with" the Pension Act, *and* a majority vote of fire and police department members and of the city council; *and* if so approved for inclusion such other employees "shall be required to fulfill such demands and requirements *as fixed by the members of the Fire and Police Department and* the *City Council* [**725] [***149] in order to make up past contributions. . . ." (Italics added.) Moreover, [*358] amendments to Ordinance 2262 are by its own terms (§ 16) permitted only after previous approval thereof by a majority of the members of the fire and police departments, voting separately by secret ballot upon each proposed amendment. [8] With the original sponsorship by those departments of the fire and police retirement system of the City, and with the adoption, enlargement, and amendment of the system thus made subject to the prior approval of the members of such departments, this clearly is not an appropriate case for application of the statement from *England v. City of Long Beach (1945) 27 Cal.2d 343, 348 [163 P.2d 865]*, cited by the majority (*ante*, p. 351), that "We must, of course, reject any theory that the provisions of the charter were designed to create an appearance of granting pensions while at the same time withholding the benefits by providing inadequate funds," or of a fiction that the City induced reliance by its fire and police departments upon reasonable expectations which the City now seeks to defeat. Instead, upon any fair view of this case, it is the City which is entitled to invoke in its own favor the principle of inducement, reliance and reasonable expectations that its employees would abide by the clear provi-

sions of the retirement and pension system which they sponsored and in large part control. The majority opinion arrives at its result by simply omitting to discuss, and thus in effect writing out of the ordinance the provisions, hereinafter pointed out, which expressly limit the liability of the City to that of matching the contributions of its covered fire and police employees. [9]

8 Section 16: "This Ordinance . . . *may be amended in the following manner*, to-wit: That any proposed improvement or amendment shall be voted upon by secret ballot in the Fire Department and Police Department, separately, . . . [and if] passed by a majority vote by each said . . . Department, then if the Council, by a majority vote, shall pass such proposed amendment, the same shall become effective and binding." (Italics added.)

9 Although not discussed in the majority opinion, it bears mentioning that plaintiffs have advanced the patently unsound argument that if it had been intended that the City's liability would be limited to matching the employee contributions, then the ordinance would not have provided that the City contribute "*not less than* the amount contributed each month by each member" of the two covered departments. (Italics added.) But had the words "not more than" been used a conflict would have existed with the language of section 5 of the Pension Act which authorizes, but does not require, the City to enhance the fund by transfer of any surplus funds of the City.

As already noted, the quoted language "not less than" must necessarily be construed in the light of the limitation imposed by the Pension Act under which Ordinance 2262 was enacted and which restricts the City's required contribution to not more than the total employee contributions. Additionally, other provisions of the ordinance discussed hereinbelow clearly demonstrate that the only mandatory contribution to which the City obligated itself was that of matching the contributions of the members of its fire and police departments.

[*359] Section 10 of the ordinance, which specifies that the contribution of each member shall be five percent of his monthly salary (7 percent by 1959 amendment), "as a basic rate," and requires the City to match such employee contribution, also states that "contributions made, either by gift, devise or from any other source, for the purpose of adding to such . . . Retirement Fund, shall be received and placed therein *without any* [employee contributions] . . . or *contribution by the City . . . to match* the same. . ." (Italics added.)

Section 11 then provides that if the donations, employee contributions, and City contributions are inadequate to pay the benefits provided by the ordinance, then the employee contributions "may be *increased by a majority vote of the members* of the Fire Department, Police Department *and Council* of the City of Eureka, *to be matched by* a similar *increase by* the *City*. . . . The *increase to be effective must have a majority vote in each Department and in the* [**726] [***150] *Council. If no increase* is *voted and* there shall *not* be *sufficient moneys in the Fund* to make the payments herein provided, *then* such *payments shall be reduced pro rata* . . . [but] *said* pro rata *reduction . . . can only be made by* a majority *vote of the members of each Department and the City Council and only in an amount agreed upon by said three Departments*. . . ." (Italics added.)

Thus, no increase in contributions can be required from either the covered employees or the City until after advance approval by each employee group *and* by the city council. This section 11 limitation plainly restricts the City's required contribution to that of matching the employee contributions. Particularly is this true in the light of the section 10 provision that neither the employees *nor the City* shall be required to match third-party donations to the retirement fund.

Although at first reading there might appear to be an anomaly in the declaration of section 11 that if no increase is voted and there is not sufficient money in the fund "to make the payments herein provided, then such payments shall be reduced pro rata" but only upon prior approval of the reduction and the amount thereof, by each employee group and by the city council, any seeming inconsistency disappears when that provision is weighed in the light of other provisions [*360] found in Ordinance 2262. Section 3, after laying down the conditions for retirement on half pay which "shall be paid from such [retirement] Fund," then declares "that said *one-half* payable *is* the *basic rate and shall be determined* by the Commission *in accordance with the amount of money in the Fund, as hereinafter provided*; . . ." (Italics added.) As already noted, section 10 also specifies a percentage of monthly salary to be contributed by each covered employee "as a basic rate."

It is thus apparent that those who had a hand in drafting Ordinance 2262, including covered members of the fire and police departments whose prior approval of the ordinance was a prerequisite to inclusion in the retirement system, considered the contingency of insufficient money in the fund to make the pension payments provided, and concluded that in such event three options should be available:

1. By mutual consent of the members and the city council, the contributions of members and of the City could be equally increased, or

2. By mutual consent of both, benefit payments could be reduced pro rata, or

3. Full benefits could be paid until exhaustion of available moneys in the retirement fund.

This was obviously the construction placed on the ordinance by the members of the fire and police departments when they approved the 1959 amendment increasing their required contributions to 7 percent of monthly salary, from the previous 5 percent. (See *ante*, fns. 5 and 8.) Further, such a construction does no violence to the direction of section 12 of the ordinance that if a covered fireman or policeman who is not entitled to retirement benefits permanently leaves the service, his contributions to the fund, plus reasonable interest, shall be returned to him or his survivors, all of whom (§ 19) are declared to have a property interest therein for withdrawal purposes. (See also § 7.) As the City emphasizes, this requirement necessarily means that the retirement commission must at all times have and hold in the fund trust assets [10] equal in value to the total amount of contributions made by all nonretired members, plus the interest, and that such assets [*361] are not available for payment of benefits to retired members. Further, under the declaration of section 19 of the ordinance that each member has "an estate to his dependents and heirs in a sum equivalent to the amount he shall have contributed, plus a reasonable rate of interest, less any [**727] [***151] deductions provided," the additional limitation is imposed that the contributions of each member may be used only for the purpose of providing the pension payable to him or his survivors. Thus it is only in the event that a nonretired member dies without heirs that (under §§ 7 and 12) [11] his contributions would become available (as are City contributions and third-party donations) for pension payments to retired members.

10 See *Jorgensen v. Cranston (1962) 211 Cal.App.2d 292, 300-301 [27 Cal.Rptr. 297]*; *Sheehan v. Board of Police Comrs. (1922) 188 Cal. 525, 530 [206 P. 70]*; cf. *Benson v. City of Los Angeles (1963) 60 Cal.2d 355, 365* [8] [*33 Cal.Rptr. 257, 384 P.2d 649]*.

11 Both sections 7 and 12 provide that in the event of death of a member without heirs, his contributions shall remain in the retirement fund.

This construction of the various provisions of Ordinance 2262, many of which are not mentioned in the majority opinion, gives a practical and consistent meaning to all, and thereby accords with the intent of the ordinance taken as a whole and with one of the most basic tenets of statutory construction. Moreover, it comports with the state statute pursuant to which the ordinance was adopted. It necessarily follows that the City's liability under the ordinance is limited to matching the employee contributions and that, accordingly, the judgment should be reversed.

EXHIBIT 11

LEXSTAT CA CONST ART XI § 5

*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
*** THROUGH 2007 CH. 750, APPROVED 10/14/07 ***

CONSTITUTION OF THE STATE OF CALIFORNIA
Article XI. LOCAL GOVERNMENT

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Const, Art. XI § 5 (2007)

§ 5. City charter provisions

(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

HISTORY:

Adopted June 2, 1970.

EXHIBIT 12

LEXSTAT CA GOV C 21166

*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
*** THROUGH 2007 CH. 750, APPROVED 10/14/07 ***

GOVERNMENT CODE
Title 2. Government of the State of California
Division 5. Personnel
Part 3. Public Employees' Retirement System
Chapter 12. Retirement from Employment
Article 6. Disability Retirement

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 21166 (2007)

§ 21166. Workers' Compensation Appeals Board's determination of industrial disability; Jurisdiction of board

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board, or in the case of a local safety member by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

HISTORY:

Added Stats 1995 ch 379 § 2 (SB 541).

EXHIBIT 13

Article 4: City Employees' Retirement System

Division 7: Death Benefits

("Management of Funds" incorp 1–22–1952 by O–5046 N.S., contained in O–10792 O.S. adopted 11–29–1926; repealed 10–25–1962 by O–8744 N.S.)
("Death Benefits" added 10–25–1962 by O–8744 N.S.)

§24.0701 Death Benefits

(a) When a Member dies, the System will pay only one of the death benefits in this Division.

(b) The System will pay the active death benefit, the death while eligible benefit or the industrial death benefit when a Member dies:

(1) while in active service and before the effective date of his or her retirement;

(2) while absent on military service, if the Member is actively contributing to the System, or contributions are being made the Member's behalf;

(3) within four months of discontinuing City service because the Member's position was abolished; or

(4) while physically or mentally incapacitated from the performance of his or her duties, if the incapacity was continuous from the time the Member stopped working.

(c) When a Member dies, the System will pay the limited death benefit to the Member's Beneficiary if the System is not required to pay any of the following benefits: the active death benefit, the death while eligible benefit or the industrial death benefit. The limited death benefit consists only of the Member's Accumulated Contributions and interest thereon.

("Death Benefits" repealed; "Death Benefits" added 4-2-2002 by O-19043 N.S.)

§24.0702 Active Death Benefit

The System will pay the active death benefit when it is required to pay a death benefit under Section 24.0701(b) and none of the following benefits is payable: the death while eligible benefit or the industrial death benefit.

The active death benefit is the sum of the following:

(a) The Member's Accumulated Contributions, including Accumulated Additional Contributions, with interest as determined by the Board.

(b) An amount, from the City's contributions, equal to one–twelfth of the Member's Final Compensation, multiplied by the Member's years of Creditable Service, not to exceed one-half of the Member's Final Compensation.

("Active Death Benefit" added 4-2-2002 by O-19043 N.S.)

§24.0703 Active Death Benefit Payment Options

(a) A Member may elect, in writing, to have all or part of the active death benefit paid in installments in one of the following two ways:

(1) In monthly installments, fixed in number or amount and without a continuance to a Beneficiary, subject to the rules adopted by the Board. The Board will credit regular interest on the balance remaining on account with the System.

(2) In equal monthly installments for the life of the Beneficiary, for no more than 120 months.

(b) If the Member dies without making an election under subdivision (a) of this section, the Member's Beneficiary may elect to receive the active death benefit as provided in subsection (1) of subdivision (a) of this section. The Beneficiary must make the election in writing before the System pays any portion of the active death benefit.

(c) If the Member or the Member's Beneficiary elects to have the active death benefit paid in installments, the System will pay the first installment on the first day of the month after the active death benefit would have become due. The subsequent installments will be paid on the first day of each month thereafter. The total of the monthly installments will be the actuarial equivalent of the active death benefit.

("Basic Death Benefit" repealed; "Active Death Benefit Payment Options" added 4-2-2002 by O-19043 N.S.)

§24.0704 Death While Eligible Benefit

(a) The System will pay the death while eligible benefit, as an option in place of the active death benefit, when an active Member dies while he or she is eligible to retire and:

(1) there is a surviving spouse who is named as the Member's Beneficiary and was married to the Member when the Member died, or

(2) the Member had one or more children under the age of 18 when the Member died.

(b) The death while eligible benefit is the sum of the following:

(1) One-half of the monthly allowance the Member would have received if the Member had retired on the day he or she died, having selected the maximum benefit. The System will pay this monthly allowance to the Member's surviving spouse for the surviving spouse's life. If there is no qualifying surviving spouse, or if the surviving spouse dies before all of the Member's children reach the age of 18, the System will pay this monthly allowance in equal shares to the Member's children under the age of 18 until each child dies or reaches the age of 18. This benefit begins to accrue on the day after the Member dies.

(2) An Annuity that is the actuarial equivalent of the Member's Accumulated Additional Contributions on the day the Member died, payable monthly to the Member's surviving spouse for life. If there is no qualifying surviving spouse, the System will pay the Member's Accumulated Additional Contributions in lump sum and in equal shares to the Member's children under the age of 18.

(c) Payment of the death while eligible benefit will stop when the Member's surviving spouse dies and all of the Member's children have either died or reached the age of 18. If this occurs before the sum of the monthly payments made, less the Annuity derived from the Member's Accumulated Additional Contributions, equals the active death benefit, the System will pay the remainder in lump sum and in equal shares to the Member's surviving children. If there are no surviving children, the System will pay the sum to the Member's named Beneficiary. If there is no named Beneficiary, the sum will be paid as stated in section 24.0706.

(d) A surviving spouse who is eligible to receive the death while eligible benefit may elect instead to receive a lump sum payment of the actuarial present value

of the benefit. If the surviving spouse chooses the lump sum payment, the actuarial present value will be determined as of the date of the Member's death.

(e) If there is no surviving spouse or child eligible to receive the death while eligible benefit, the System will pay the active death benefit to the Member's named Beneficiary. If there is no named Beneficiary, the sum will be paid as stated in section 24.0706.

("Basic Death Benefit Payment Options" repealed; "Death While Eligible Benefit" added 4–2–2002 by O–19043 N.S.)

§24.0705 Industrial Death Benefit

(a) The System will pay the industrial death benefit, instead of the active death benefit, when a Member dies from industrial causes, as determined by the Workers' Compensation Appeals Board using its normal hearing procedures, if :

(1) there is a surviving spouse who is named as the Member's Beneficiary and was married to the Member when the Member died, or

(2) the Member had one or more children under the age of 18 when the Member died.

(b) The industrial death benefit is the sum of the following:

(1) A monthly allowance equal to one-half of the Member's Final Compensation, paid to the Member's surviving spouse for the surviving spouse's life. If there is no qualifying surviving spouse, or if the surviving spouse dies before all of the Member's dependent children reach the age of 18, the System will pay this monthly amount in equal shares to the Member's children under the age of 18 until each child dies or reaches the age of 18. This benefit begins to accrue on the day after the Member dies.

(2) An annuity that is the actuarial equivalent of the Member's Accumulated Additional Contributions on the date the Member died, payable monthly to the Member's surviving spouse for life. If there is no qualifying surviving spouse, the System will pay the Member's Accumulated Additional Contributions in lump sum and in equal shares to the Member's children under the age of 18.

(c) Payment of the industrial death benefit will stop when the Member's surviving spouse dies and all of the Member's children have either died or reached the age of 18. If this occurs before the sum of the monthly payments made, excluding the annuity derived from the Member's Accumulated Additional Contributions, equals the active death benefit, the System will pay the remainder in lump sum and in equal shares to the Member's surviving children. The System will also pay the Member's Accumulated Additional Contributions, less the Annuity paid from these contributions, to the Member's surviving children, in equal shares. If there are no surviving children, the System will pay the remainder to the Member's named Beneficiary. If there is no named Beneficiary, the sum will be paid as stated in section 24.0706.

(d) A surviving spouse who is eligible to receive the industrial death benefit may elect instead to receive a lump sum payment of the actuarial present value of the benefit. If the surviving spouse chooses the lump sum payment, the actuarial present value will be determined as of the date of the Member's death.

(e) If, at the time of the Member's death, the Worker's Compensation Appeals Board has not yet determined whether the Member's death was industrial, the System may pay the active death benefit. If the Worker's Compensation Appeals Board later determines that the Member's death was industrial, and there is a qualifying surviving spouse or minor child, the System will then pay the special death benefit less the amount of the active death benefit.

("Special Death Benefit — Safety Member" repealed; "Industrial Death Benefit" added 4–2–2002 by O–19043 N.S.)

§24.0706 Beneficiary Not Designated

(a) The System will pay all amounts due because of the death of a Member or retiree as provided in subdivision (b) of this section if the Member's estate would not be probated if no amounts were due from the System and:

(1) the Member did not name a Beneficiary,

(2) there is no living named Beneficiary,

(3) after reasonable efforts, the Board is unable to locate the named Beneficiary, or

(4) the Beneficiary is the Member's estate.

(b) Payment will be made, in the following order, to the Member or retiree's:

(1) surviving spouse,

(2) children,

(3) parents,

(4) siblings,

(5) next of kin.

(c) The System will not make any payment under this section to persons in any group if there are living persons in any earlier group on the date of payment.

(d) The System will not make any payment under this section without first receiving from each payee an affidavit that complies with the California Probate Code.

("Special Death Benefit — Safety Member — Computation" repealed; "Beneficiary Not Designated" added 4-2-2002 by O-19043 N.S.)

§24.0707 Payment to Funeral Director in the Absence of a Beneficiary

(a) The Board may pay any of the amount due from the System because of the death of a Member or retiree to the funeral director who conducted the funeral, or to the person or organization that paid the funeral expenses, if:

(1) the Member did not name a Beneficiary,

(2) there is no living named Beneficiary,

(3) the Board is unable to locate the named Beneficiary, or

(4) the Beneficiary is the Member's estate.

(b) Payment under this section will not exceed the actual cost of the funeral or the portion of that cost paid by the person or organization to the funeral director , as shown by the funeral director's sworn itemized statement and by any other documents required by the Board.

(c) Payment under this section will fully discharge the System for the amount paid.

("Effective Date of Special Death Benefit, Modified Special Death Benefit, and Death While Eligible Benefit" repealed; "Payment to Funeral Director in the Absence of a Beneficiary" added 4–2–2002 by O–19043 N.S.)

§24.0708 Uniform Simultaneous Death Act

California law regarding the distribution of estates under the Uniform Simultaneous Death Act governs payments made by the System because of the death of a Member, retiree or Beneficiary. In applying the Uniform Simultaneous Death Act to benefits paid to a Beneficiary, benefits under this System will have the same status as benefits under insurance policies.

("Basic Death Benefit Paid to Designated Beneficiary or Estate" repealed; "Uniform Simultaneous Death Act" added 4–2–2002 by O–19043 N.S.)

§24.0709 Continued Health Coverage

A Safety Member's surviving spouse or dependent child who is eligible for the industrial death benefit is entitled to continued health coverage as provided in California Labor Code Section 4856 and may be entitled to additional benefits under Section 24.1201.

("Special Death Benefit—Payment to Surviving Minor Children" repealed; "Continued Health Coverage" added 4-2-2002 by O-19043 N.S.)

§24.0710 Retiree Death Benefit

When a retired Member dies, the System will pay a retiree death benefit of $2,000 to the retired Member's named Beneficiary. If there is no designated Beneficiary, the benefit will be paid according to sections 24.0706 and 24.0707.

("Industrial Death Benefit" repealed; "Retiree Death Benefit" added 4–2–2002 by O–19043 N.S.)

EXHIBIT 14

LEXSEE 70 CAL COMP CAS 1725

CALIFORNIA COMPENSATION CASES

Ralph C. Mauzy (Widower) and **Donna P. Mauzy (Dec'd)**, Petitioners v. Workers' Compensation Appeals Board, City of San Diego, PSI, San Diego City Employees Retirement System, Respondents

Civil No. D046915--

Court of Appeal, Fourth Appellate District, Division One

70 Cal. Comp. Cas 1725; 2005 Cal. Wrk. Comp. LEXIS 342

November 10, 2005

PRIOR HISTORY: [**1]
Prior History: W.C.A.B. No. SDO 0288532--WCJ Ronald W. Smitter (SDO); WCAB Panel: Commissioners Murray, Brass, Cuneo (concurring, but not signing)

DISPOSITION: *Disposition:* Petition for writ of review denied

HEADNOTE: Injury AOE/COE--Going and Coming Rule--Special Mission Exception--WCAB held applicant's injury and death from motor vehicle accident on 6/23/2001 was not injury/death AOE/COE because injury/death was barred by going and coming rule and because special mission exception did not apply, when WCAB found applicant city police officer was involved in fatal motor [*1726] **vehicle accident on her way to work at usual patrol duties at usual duty station but at different hours pursuant to defendant's request that all employees work different hours during time of conference being held in city, and working slightly different hours in circumstances was not special mission.** [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.150-4.151, 4.153, 4.157.]

Decedent, employed by Defendant as a police officer, was killed in a motor vehicle accident on her way to work on 6/23/2001. Applicant, Decedent's surviving spouse, sought death benefits, alleging that Decedent's [**2] death was industrially related. Defendant denied liability, contending in relevant part that Applicant's death claim was barred by the "going and coming" rule.

On 3/29/2005, the WCJ issued an F&A, finding in relevant part that Decedent's death was not caused by injury AOE/COE. Applicant sought reconsideration, contending in relevant part that the WCJ's findings of fact did not support the order, decision, or award.

In his Report, the WCJ recommended that reconsideration be denied. According to the WCJ, Applicant failed to provide any details in support of the petition, including any statement of facts relied on and any discussion of applicable law.

The WCJ stated that, under general principles of workers' compensation law, an employee commuting to or from work is generally not considered to be acting within the course and scope of his or her employment at that time, that this "going and coming" principle or rule is subject to an exception when the commuting employee is on a "special mission" or errand for the employer, and that the special mission exception applies when the employee is requested to perform an unusual service or a usual service at an odd hour. [**3] Citing *Luna v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 77, 244 Cal. Rptr. 596, 53 Cal. Comp. Cases 102,* the WCJ indicated the trip becomes "special" because the bother and effort of the trip itself is an important part for which the employee is being compensated. Citing *General*

Insurance Co. v. Workers' Comp. Appeals Bd. (1976) 16 Cal.3d 595, 546 P.2d 1361, 128 Cal. Rptr. 417, 41 Cal. Comp. Cases 162, the WCJ observed, however, that the special mission rule is ordinarily held inapplicable when the only special component is the fact that the employee began work earlier or quit work later than usual.

The WCJ further stated that Defendant notified all police personnel by written announcement on 5/15/2001 of the upcoming special Biotech Conference to be held in the City of San Diego on 6/24/2001 through 6/27/2001, and that on 6/8/2001 Defendant's police department issued a final order that provided that all sworn personnel, including Decedent, were required to work 12-hour shifts with no days off during the conference. The WCJ stated, [**4] however, that the overtime work requirement imposed no fundamental change in Decedent's work schedule since she normally worked four, 10-hour days, and that, instead of beginning her work schedule at her normal 9:00 P.M. time on the day of her fatal accident, Decedent [*1727] had been instructed to report for work beginning 6:00 P.M. and was en route to report at the time of her fatal automobile accident. The WCJ noted that Decedent was not required to perform any special or extraordinary duties during the conference, was not assigned to the mobile field force with special Biotech Conference responsibilities, but rather was to maintain her ordinary regular patrol duties and was to report to her normal command at Central Station. The WCJ stated that working slightly different hours under these circumstances was not a special mission. Accordingly, the "going and coming" rule applied, and the "special mission" exception did not.

The WCAB denied reconsideration and adopted and incorporated the WCJ's report without further comment.

Applicant filed a Petition for Writ of Review, contending in pertinent part that Decedent was on a special mission at the time of her fatal [**5] automobile accident, that under *Labor Code § 3202* the Workers' Compensation Act was to be liberally construed by the courts for the purpose of extending the benefits for the protection of persons injured in the course of their employment, that Decedent had received orders to report early--she had not volunteered--and that, if Decedent had reported at her usual time, she would not have been involved in the automobile accident that killed her. Based on these factors, Applicant contended that the special mission exception applied.

Defendant filed an Answer in support of the WCAB's decision, contending in pertinent part that Applicant's Petition was untimely, that while it was filed within 45 days of the entry of a "corrected" Order Denying Reconsideration, it had not been filed within 45 days of the original Order. Defendant further contended that Applicant incorrectly contended that the San Diego City Employees' Retirement System was a real party in interest.

WRIT DENIED November 10, 2005.

By the Court:

"The petition for writ of review, answer, motion for dismissal, and opposition to the motion have been read and considered [**6] by Justices Benke, Haller and McDonald.

Donna Mauzy was a police officer with the City of San Diego (city). On May 15, 2001, the police department notified officers that the Biotech Conference would be taking place in San Diego from June 24 through June 27. On June 8 the police department issued an order requiring officers to work 12-hour shifts with no days off starting at 6:00 p.m. on June 23 because of the conference, and directing those assigned to the third watch patrol to report to their normal command and work from 6:00 p.m. to 6:00 a.m.

On June 22 Officer Mauzy reported for the third watch patrol at 'central' (her normal command) and worked from 9:00 p.m. until 7:00 a.m. the following morning [*1728] (her regular schedule). In line with the June 8 order, Officer Mauzy was supposed to report for the third watch patrol at central on June 23, work from 6:00 p.m. to 6:00 a.m. the following morning, and perform her regular duties (she was not involved in the Biotech event). Officer Mauzy was killed in a motor vehicle accident on her way to work on June 23.

Officer Mauzy's heirs claimed a special death benefit from the city. The workers' compensation judge (WCJ) [**7] denied the benefit finding Officer Mauzy's death was not caused by an injury arising out of and occurring in the course of her employment because the accident that resulted in her death did not fall within the 'special mission exception' to the 'going and coming rule.' The heirs sought reconsideration. The WCJ issued a report and recommendation that reconsideration be denied. The Workers Compensation Appeals Board (Board) adopted the report and denied reconsideration.

In this petition, the heirs rely principally on *City of Santa Rosa v. Workers' Comp. Appeals Bd. (2002) 68 Cal.Comp.Cases 65* [writ denied] to challenge the finding that Officer Mauzy was not on a special mission when she was killed. The city counters the petition is untimely, raises various procedural objections and argues that Officer Mauzy does not qualify for the 'special mission exception.' The San Diego City Employees' Retirement System (retirement system), which the heirs named as a party on the petition, filed a motion to be dismissed.

As a preliminary matter, we deem the petition timely because it was filed by the heirs less than 45 days after the Board issued the corrected [**8] order denying reconsideration requested by the city. We also grant the motion to dismiss the retirement system as a party because the retirement system was not a party to the underlying workers' compensation proceedings.

Review of a decision of the Board is limited to whether the Board acted without or in excess of its powers, and whether the order, decision or award was unreasonable, not supported by substantial evidence, or procured by fraud. (*Lab. Code, § 5952.*)

The evidence before the administrative body showed Officer Mauzy was not involved in a special activity in relation to her regular duties when she sustained her injuries: She was scheduled to work her regular patrol assignment at her regular station and, although she had to report to work at hours slightly different than usual, so did every other officer in the city. ' "The special mission rule 'is ordinarily held inapplicable when the only special component is the fact that the employee began work earlier or quit work later than usual.' " ' (*Baroid v. Workers' Comp. Appeals Bd. (1981) 121 Cal.App.3d 558, 562 [175 Cal. Rptr. 633, 46 Cal. Comp. Cases 790],* [**9] quoting *General Ins. Co. v. Workers' Comp. Appeals Bd. (1976) 16 Cal.3d 595, 601 [546 P.2d 1361, 128 Cal. Rptr. 417, 41 Cal. Comp. Cases 162].)* The heirs' authority is distinguishable to the extent the officer in the case involving the City of Santa Rosa was injured en route to attend the city's 'first-ever strategic [*1729] planning committee meeting' at the request of his employer and his participation at the meeting was not part of his ordinary duties as a patrol officer.

The petition is denied. The motion to dismiss the retirement system as a party is granted."

Haller, Acting P.J.

COUNSEL: *Counsel:* For petitioners--Schroth & Schroth, by Robert E. Schroth, Sr.
For respondent employer--Office of the City Attorney, Civil Division, by Michael J. Aguirre, City Attorney, Robert J. Mulcahy, Deputy City Attorney

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral OverviewWorkers' Compensation & SSDIBenefit DeterminationsDeath BenefitsWorkers' Compensation & SSDICompensabilityCourse of Employment-General Overview

EXHIBIT 15

LEXSEE 89 CA 3D 877

DANIEL ROCCAFORTE, JR., Plaintiff and Appellant, v. CITY OF SAN DIEGO et al., Defendants and Respondents

Civ. No. 16629

Court of Appeal of California, Fourth Appellate District, Division One

89 Cal. App. 3d 877; 152 Cal. Rptr. 558; 1979 Cal. App. LEXIS 1431

January 31, 1979

PRIOR HISTORY: [***1] Superior Court of San Diego County, No. 395724, Jack R. Levitt, Judge.

DISPOSITION: Judgment reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A police officer who was injured while making an arrest petitioned for a writ of mandate to review the contradictory decisions of several city agencies with respect to the severity and permanency of his injuries. First, his injury leave pay was terminated because his condition had become permanent and stationary. After the personnel section of the police department refused on medical grounds to reinstate plaintiff to his job, he applied to the city retirement board for a service-connected disability pension. The application was denied with the board declaring that plaintiff was not currently or permanently incapacitated. The trial court upheld each administrative action. (Superior Court of San Diego County, No. 395724, Jack R. Levitt, Judge.)

On appeal by the injured employee, the Court of Appeal reversed. The court held as a matter of law that petitioner's right to injury leave pay, to retirement benefits and to reemployment were vested rights that were fundamental in nature. Accordingly, the court held that the trial court was required not only to examine the administrative record for errors of law, but to exercise its independent judgment upon the weight of the evidence produced. Although it was not clear from the record whether or not the trial court had exercised its independent judgment, the court held that even if the correct standard had been applied, there was no substantial evidence to support the trial court's findings. The court also held that a city is a single entity with respect to its contractual obligations and that conflicting administrative decisions should not permit it to avoid its overall obligation. Opinion by Staniforth, J., with Cologne, Acting P. J., Wiener, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Administrative Law § 134--Judicial Review--Scope and Extent--Evidence--Independent Judgment Rule--Nonconstitutional Agencies--Fundamental and Vested Rights. --The independent judgment standard of review is required whenever an administrative decision substantially affects fundamental and vested rights. Thus, in an action to review conflicting administrative decisions denying a police officer's applications for injury leave pay, retirement benefits or reemployment, the trial court was required not only to examine the administrative record for errors of law, but to exercise its independent judgment upon the weight of the evidence produced.

(2) Administrative Law § 134--Judicial Review--Scope and Extent--Evidence--Independent Judgment Rule--Nonconstitutional Agencies--Scope of Appellate Review--Substantial Evidence Test. --In reviewing a judgment of a trial court that exercised its independent judgment, an appellate court must sustain the superior court's findings only when they are supported by substantial evidence. Thus, in an action by a police officer whose applications for injury leave pay, retirement benefits, or reemployment were all denied because of conflicting administrative determinations as to the severity and permanency of his injuries, the trial court erred in upholding the administrative decisions, where the medical reports were lacking in any facts to give substantial evidence in support of the judgment, and where the same

reports were relied upon by different city offices to reach contradictory conclusions.

(3) Municipalities § 85--Contracts--City as Single Entity for Purposes of Enforcing Contractual Obligations. --Although a city has many departments and subdepartments, it is a single entity in its contractual obligation.

COUNSEL: Lewis & Marenstein and Patrick J. Thistle for Plaintiff and Appellant.

John W. Witt, City Attorney, and Thomas F. Calverley, Deputy City Attorney, for Defendants and Respondents.

JUDGES: Opinion by Staniforth, J., with Cologne, Acting P. J., and Wiener, J., concurring.

OPINION BY: STANIFORTH

OPINION

[*879] [**559] Police Officer Daniel Roccaforte, Jr. (Roccaforte) was injured while making an arrest. His employer, the City of San Diego (City), first accepted responsibility and paid Roccaforte full pay injury leave benefits until April 1, 1977. The City then terminated the injury leave pay and thereafter denied disability retirement pay and at the same time refused to reinstate him to his duties as a police officer.

[**560] Roccaforte sought a writ of mandate to overturn these decisions made by three separate agencies or departments of the City. Roccaforte questioned these specific decisions: (1) the termination of injury leave pay by Rick Cumming III, Safety Officer, City of San Diego; (2) the denial of industrial disability retirement by the Retirement Board of Administration, [***2] City of San Diego (Retirement Board), and (3) the refusal by William Kolender, Chief of Police, San Diego, to reinstate Roccaforte to active duty as a police officer. The trial court viewed these actions separately and found (1) the termination of injury leave pay was supported by medical evidence and that Roccaforte had failed to exhaust his administrative remedies, (2) the denial of industrial disability retirement was supported by medical evidence, and (3) the reinstatement of Roccaforte to active duty as a policeman was premature and thereupon denied his petition for writ of mandate. Roccaforte appeals.

Facts

Roccaforte was a police officer employed by the City on November 21, 1975, when in the course of his duties he was injured while attempting to make an arrest of a violent person. Roccaforte forthwith was taken to the hospital, received medical diagnosis and treated for the resultant injuries. He remained off work until January 4, 1976, and the City provided medical treatment and paid compensation in the form of injury leave pay until Roccaforte returned to active duty in January 1976.

On March 13, 1976, Roccaforte was examined by Dr. Paul Leonard referable to his injuries. [***3] Dr. Leonard reported: "[Roccaforte] was involved in an altercation on that date suffering injuries to the neck, back, [*880] and right hand. He was off work about 6 weeks and under treatment of Dr. Whaalen. He was treated for a crush injury to the right midfinger, as well as neck and back injury. He had [received] a blow to the head when he fell hitting the right frontal area on cement. He had a large area of swelling but he was not unconscious. He is back at work and continues to have the following complaints:

"1. Pain of the right midfinger involving the mid and distal joints. Pain is precipitated by cold and damp weather, or any effort at strenuous gripping or squezzing [*sic*];

"2. Neck pain, primarily at the base of the neck and moving upward. He develops occipital orbital headaches which are quite severe on an occasional basis. Neck pain is not constantly present but occurs at least 3 to 4 times/week. It seems to be precipitated by nervous tension. He finds that he has discomfort especially at night which interferes with his capacity to sleep because of the pain. He denies difficulty with recall, difficulty with concentration, spots in front of the [***4] eyes, ringing of the ears, personality change, loss of sense of taste or smell, or other symptomatology of post-traumatic head syndrome.

"The patient also complains of back pain precipitated by prolonged driving, lifting over 20 to 25 pounds. Pain will radiate from the waist down to the tailbone but does not go into the hips or legs. Pain is present only with these activities described above. He states he used to lift [weights] and was in fairly good shape capable of handling fairly heavy lifting without difficulty, but now cannot do any workouts because they markedly accentuate his pain." And the doctor concludes:

"This man has residuals of chronic cervical and lumbar strain and sprain, as well as crush injury to the right midfinger. There is loss of grip in the right major hand, pain of the low back which interferes with his capacity to do more than light lifting on a repetitive basis. There is no evidence of neurologic deficit in either the upper or lower extremities.

"His condition appears to be stationary and ratable, for all practical purposes based on the above objective findings." And the doctor adds this enigmatic opinion:

"He may continue working as a peace officer [***5] without specific restrictions, but [**561] could not do more than light lifting on a repetitive basis."

[*881] Roccaforte continued to receive medical care and continued at work through March 31 when he absented himself, on the advice of Dr. Haaland, his treating physician, due to the medical problems related to his injuries. He applied for and was granted further injury leave pay for a period during the month of April 1976.

On April 23, 1976, Rick Cumming III wrote Roccaforte: "It is my unfortunate duty to inform you that injury leave benefits for the above injury must cease effective on the date indicated above.

"Your injury leave benefits are being terminated because your doctor has indicated that your condition has become permanent and stationary. The rules governing the injury leave program specify that these benefits must cease when we are so notified.

"In the meantime, you are still eligible for Workmen's Compensation benefits and you may use your accumulated sick leave for your absences. If you have no sick leave then you will receive temporary disability payments.

"I sincerely hope that you are recuperating well."

Thereafter on May 21, 1976, Roccaforte's [***6] physician Dr. Haaland reported to the City that because of Roccaforte's persistent discomfort related to the November 1975 injury, he elected to declare Roccaforte temporarily disabled for "six to eight weeks." The City, however, refused and continued to refuse to pay injury leave to Roccaforte.

Concurrent with the City's termination of injury leave benefits, another agency of the City refused to reinstate Roccaforte to his job as a policeman. By letter of April 25, 1976, Roccaforte was advised by the representative of the San Diego Police Department, personnel section, that the work restrictions contained in Dr. Leonard's report of March 17 precluded his return to work at the police department.

On June 16 Roccaforte filed an application for a service-connected disability pension pursuant to the San Diego City Employees Retirement System's Rules. At the request of the Retirement Board (the body charged with determining Roccaforte's claim to disability pension) Roccaforte was examined by Dr. F. Bruce Kimball who by report dated July 7, 1976, concluded:

[*882] "Therefore I do not think he is permanently incapacitated for the performance of his duties, but I think he is temporarily [***7] totally incapacitated at this time for any of the duties listed in the attached job descriptions.

"As to treatment I would recommend that he be placed under the care of some orthopedist and given maximum benefit of all types of treatment that may be available, even including hospitalization, traction, and physical therapy, and immobilizing devices if indicated. After another six months he may then be reassessed. It is hoped that he would recover in that period of time."

In early September 1976, Roccaforte received a further letter from the personnel section of the San Diego Police Department stating that medical reports in their possession showed Roccaforte did not meet the medical requirements for the position of a police officer. The letter further related that Roccaforte "had certain options available to him and that 'it is mandatory that one of these options be completed within forty-five (45) days from the receipt of the letter.'" [1]

1 These options were:

"1. Provide competent medical evidence indicating that Petitioner is physically qualified for his position,

"2. Request transfer to a job classification for which Petitioner is physically and vocationally qualified to perform,

"3. Initiate and complete retirement proceedings, and

"4. Resign his position as a Police Officer."

[***8] The Retirement Board, on September 17, 1976, considered Roccaforte's application for a service-connected disability retirement at an informal hearing and examined the [**562] reports of Drs. Leonard, Haaland and Kimball. No further testimony was taken and Roccaforte's application was denied. Roccaforte promptly requested a formal hearing before the Retirement Board.

On September 22, 1976, Roccaforte was examined by Dr. McDade at the request of the workers' compensation section of the City. Dr. McDade made but one examination of Mr. Roccaforte but prepared two reports which were made part of the record in the formal hearing before the Retirement Board. The first report (Nov. 18, 1976) was comprehensive by nature. Dr. McDade described Roccaforte's history, complaints, symptoms and concluded that Roccaforte's medical condition was "permanent and stationary." Dr. McDade further concluded he could "See no reason why Mr. Roccaforte could not return to his usual work [*883] activity as a police officer in an unrestricted capacity." Dr. McDade's second report, *again based upon the single examination* of Roccaforte, stated his examination had not been completed and "in all [***9] fairness to both sides, his hand and finger should be examined in some detail prior to com-

pleting my orthopedic evaluation for you." No further evaluation was in fact conducted by Dr. McDade.

At the formal hearing before the Retirement Board (Dec. 1, 1976) the various doctors' reports recited above were received and considered. Roccaforte testified concerning his injuries and treatment. He related his present condition of severe pains in the upper and lower back, severe headaches, pain in right hand, loss of strength in the right hand, loss of sensation in the middle and ring finger of the right hand. He further explained Dr. McDade's failure to make a further examination. He testified that Dr. McDade had not requested him to return to the office nor did Dr. McDade phone or communicate with him by mail since the first examination.

Sergeant Thomas Blackledge of the San Diego Police Department testified the restrictions contained in Dr. Leonard's report of March 1975 would preclude the injured officer from returning to work for the City. He stated the qualifications for a police officer included the ability to engage in fights if the need arises, to make arrests, to handle calls [***10] for service to perform a range of activities from quieting a barking dog to carrying a body out of the canyon. His opinion was based upon Roccaforte's testimony, as well as the medical documentation in his file, it was not proper for Roccaforte to return to work as a police officer.

After this formal hearing the Retirement Board denied Roccaforte's request declaring:

"1. The applicant's injury or disease is not known as substantiated by Exhibits 1 through 8 and the oral testimony of Mr. Roccaforte.

"2. The applicant is not currently incapacitated as substantiated by reports of Dr. F. Bruce Kimball dated 7/7/76 and Dr. William C. McDade dated 11/18/76.

"3. The applicant is not permanently incapacitated from the performance of duty as a result of the above injury or disease as substantiated by the medical reports in #2 above.

[*884] "4. The injury or disease was not due to intemperance, willful misconduct, or violation of law by the applicant as substantiated by the Department Head Remarks in Exhibit C."

Roccaforte, in response to the findings (2 and 3 above) of the Retirement Board, presented himself to the personnel officer of the San Diego Police Department and requested [***11] to be returned to work. This request was denied on December 6, 1976. The chief of police wrote: "At the present time Daniel Roccaforte does not meet the physical qualifications for the position of police officer." Thus Roccaforte found himself in this administrative crossfire: one office of the City refuses to pay him injury leave pay on the grounds that medical evidence indicates his position was permanent and stationary. A second administrative arm of the City, the Retirement Board, denied him disability retirement benefits since he is not currently "incapacitated." A third face of the City, the police department, refused him reemployment as a police [**563] officer for he does not meet "the physical qualifications." From the vortex of this administrative quagmire Roccaforte petitioned for writ of mandate.

Both parties raised the issue of the standard of judicial review of the administrative determination in their pleadings and in their authorities before the trial court. The *Strumsky* standard (*Strumsky v. San Diego County Employees Retirement Assn., 11 Cal.3d 28, 34 [112 Cal.Rptr. 805, 520 P.2d 29]*) was brought to the court's attention. However, the focus [***12] of the discussion before the trial court was whether *substantial evidence* upheld the various administrative findings. The trial court in its summation and oral statement of decision found *no abuse of discretion* in terminating the injury leave pay -- based upon Dr. Leonard's report. The trial court further found that Roccaforte had not appealed from that decision as required by section 4, subdivisions (c) and (d), of the personnel manual section 37.63.

Concerning the Retirement Board's action, the court said: "The Board's decision is supported by ample evidence . . . ." A few moments later, however, the court said: "[The] court, after reading all of those reports and exercising its independent opinion, is of the opinion that the Board properly found that there was not a permanent incapacity justifying an industrial retirement." It is not clear from a reading of the court's decision as to what standard of review was applied to the Retirement Board determinations. It is clear that the substantial evidence test was applied to the City's decision to terminate injury leave pay. We do not know what standard the judge applied to support the decision by [*885] the police [***13] department. The best that can be gleaned in totality is that there is an ambiguity as to what standard of review was applied by the court.

Discussion

(1) The independent judgment standard of review is required wherever an administrative decision substantially affects fundamental and vested rights. (*Strumsky, supra, at p. 34*; *Bixby v. Pierno, 4 Cal.3d 131, 144 [93 Cal.Rptr. 234, 481 P.2d 242]*; *Merrill* v. *Department of Motor Vehicles*, 71 Cal.2d 907, 914, 915 [*80 Cal.Rptr. 89, 458 P.2d 33]*.) The term "vested" is defined in *Harlow v. Carleson, 16 Cal.3d 731, 735 [129 Cal.Rptr. 298, 548 P.2d 698]*, where it was stated: "The term 'vested' has been used in a nontechnical sense to denote generally a right 'already possessed' [citation] or 'legitimately ac-

quired.' [Citation.] On this basis, this court has distinguished generally between applicants and recipients in determining whether a right is 'vested' for the limited purpose of determining the applicable scope of review."

And in *Bixby v. Pierno, supra, 4 Cal.3d 131, 144-145*: "In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect [***14] of it in human terms and the importance of it to the individual in the life situation. This approach finds its application in such an instance as the opportunity to continue the practice of one's trade or profession . . . ."

In *Dickey v. Retirement Board, 16 Cal.3d 745 [129 Cal.Rptr. 289, 548 P.2d 689]*, the Supreme Court considered this fundamental vested right question where Dickey requested payment of "full pay disability benefits" based upon an injury he had received in the course of his duty as a police officer. The right claimed by Dickey although called by a different name is similar to that claimed by Roccaforte. The Supreme Court said at pages 748-749:

"We consider first whether the right is vested. It is well settled that retirement benefit rights -- including pensions whether for age and service, disability or death -- are vested [citations]. In *Strumsky* we held such a right to be vested so as to require application of the independent judgment standard in reviewing the administrative decision of a local agency. Pension rights of police officers provided [**564] by city charters are considered part of their compensation, serve as incentives toward [***15] public service, and vest at the time of their employment. 'It has been clearly held [*886] that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant.' [Citation.]

"We can perceive no significant difference in this respect between provisions for pensions on retirement for disability and provisions for full salary payments for disability during active career employment. Each would appear to be a part of the contemplated compensation to police officers that would vest upon the acceptance of employment. The Board contends, however, that plaintiffs' rights to full salary disability benefits do not vest until all the contingencies have occurred, that is, until the police officer is incapacitated for the performance of his duties and such incapacity is determined to be the result of 'bodily injury received in or illness caused by the performance of his duty.' It is obvious that the officer would [***16] not be entitled to receive the benefits until all the conditions prescribed by the San Francisco City Charter have been met. However, as our above decisions make abundantly clear, the *right* to the benefits vests upon acceptance of employment although the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures [citation] or may not be enforceable because of the nonoccurrence of one or more conditions precedent. [Citations.]"

We conclude as a matter of law that Roccaforte's right to injury leave pay, his right to retirement benefits as well as his right to reemployment are vested rights and are fundamental in nature within the meaning of *Strumsky, supra, Bixby, supra*, and *Dickey, supra.* Therefore the trial court was required not only to examine into the administrative record for errors of law but to exercise its independent judgment upon the evidence as disclosed "in a limited trial de novo." (*Bixby, supra, at p. 143.*) The trial court must weigh the evidence and exercise its independent judgment upon the weight of the evidence produced. (*Bixby, supra, p. 143, fn. 10*; *Dare v. Bd. of Medical* [***17] *Examiners, 21 Cal.2d 790, 797, 799 [136 P.2d 304].*)

The uncertainty as to the standard of review used by the trial court could be resolved by appropriate findings of fact. However, it appears here that no findings of fact or conclusions of law were made nor were any requested. Where as here the applicable scope of review is that [*887] of independent judgment, findings must be made if requested. (Cal. Admin. Mandamus (Cont.Ed.Bar 1966) § 14.2, pp. 234, 235.) Further, and most applicable here is the observation in *Strumsky, supra*, that findings would enable the reviewing party to determine what test the trial court employed in reviewing the administrative decision and the ground upon which it found that test to be applicable. The vagueness and ambiguity of the oral statement of the trial court as to the tests actually used, when coupled with the failure to supply this court with appropriate findings to allow this court to determine for itself the tests used, leads us to this cul de sac. This court cannot say with certainty what standard was used. What is crystal clear is that no limited trial de novo is evidenced in this record. No resolution of conflicting administrative [***18] determinations appears; conflicts in medical testimony abound but remain unresolved. No independent judgment appears to have been exercised to settle these cross-contentions.

If we make the unfounded assumption that the correct standard, the independent judgment test, was used by the court, yet the judgment is in error.

(2) An appellate court must sustain the superior court's findings [**565] if substantial evidence supports them. (*Pasadena Unified Sch. Dist. v. Commission on Profes-*

sional Competence, 20 Cal.3d 309, 314 [142 Cal.Rptr. 439, 572 P.2d 53].)

In our quest for substantial evidence to support the trial court's exercise of its independent judgment, we note the Retirement Board relied upon the reports of Drs. Kimball and McDade. Dr. McDade's conclusive -- contradicting -- findings have been previously underscored. Roccaforte's "hand and finger should be examined in some detail prior to completing my orthopedic evaluation to you." The report of Dr. Kimball is equally lacking in any facts to give substantial evidence in support of the trial court's judgment. Dr. Kimball's conclusion was "he is temporarily totally incapacitated" for any of the duties listed in [***19] the attached description. "After another six months he may be then reassessed."

Furthermore, this self-same evidence was viewed by the employer arm of the City, a responsible police officer who concluded Daniel Roccaforte "does not meet the physical qualifications for . . . police officer." These latter conclusions are contradictory and in direct opposition to the decision of Rick Cumming III who found that the injury leave benefits should be terminated "because your doctor has indicated your condition has become permanent and stationary."

[*888] The end result of this schizoid approach to the contractual duty owed by the City to Roccaforte is a Catch 22 situation for Roccaforte. Although he was concededly injured in the course of his duties as a police officer and for that reason he has not been permitted to return to duty, yet he is denied any relief during his period of incapacity due to conflicting views taken by different agencies of the same medical reports.

The real party in interest in these proceedings is the City of San Diego. It is bound by contractual agreements with Roccaforte. It is bound by the police department's determination that Roccaforte was not employable [***20] by reason of his injuries. **(3)** While the City has many departments and subdepartments, yet it is a single entity in its contractual obligation. (*Johnson v. Fontana County F. P. Dist., 15 Cal.2d 380, 391 [101 P.2d 1092].*)

The employer branch of the City, the police department, made this critical decision. Roccaforte was unfit for police duties due to a job related injury. This prime determination compelled payment of injury leave pay; or if Roccaforte's injuries were permanent and stationary -- and he was still not acceptable for work -- an appropriate award by the Retirement Board was in order. The trial court examined the three administrative decisions as separate, unrelated to the City's overall obligation to Roccaforte. This approach permitted the City to avoid its duty to compensate Roccaforte through one of its appropriate agencies for the injuries he received in the course of his police work. It was and is the trial court's duty, after examination of the evidence, contract requirement and applicable law, to exercise its independent judgment, to cut that Gordian knot of conflicting administrative decisions to the end that Roccaforte be awarded that which his employment [***21] contract and the medical facts demand.

The City's contention that Roccaforte did not exhaust his administrative remedies is without merit. Roccaforte did not contest the findings by Rick Cumming III that his condition was permanent and stationary. Therefore, he did not appeal this decision. When the Retirement Board adopted the contrarywise position, Roccaforte's appeal time had long since run.

Judgment reversed.

EXHIBIT 16

LEXSEE 91 CA 3D 54

JOHN C. GREATOREX, Plaintiff and Appellant, v. BOARD OF ADMINISTRATION OF THE CITY EMPLOYEES' RETIREMENT SYSTEM OF THE CITY OF SAN DIEGO, Defendant and Respondent; CITY OF SAN DIEGO, Real Party in Interest and Respondent

Civ. No. 16787

Court of Appeal of California, Fourth Appellate District, Division One

91 Cal. App. 3d 54*; *154 Cal. Rptr. 37*; *1979 Cal. App. LEXIS 1552*; *44 Cal. Comp. Cas 553

March 27, 1979

SUBSEQUENT HISTORY: [***1] A Petition for a Rehearing was Denied April 12, 1979, and the Petition of all the Respondents for a Hearing by the Supreme Court was Denied June 27, 1979.

PRIOR HISTORY: Superior Court of San Diego County, No. 400022, Wesley B. Buttermore, Jr., Judge.

DISPOSITION: The denial of the writ of mandamus was improper. The case is reversed and remanded for a new proceeding consistent with this opinion.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A city fireman who suffered a heart attack was granted compensation benefits by the Workers' Compensation Appeals Board, which adopted a stipulation by the city that the fireman's injury was work related. In a subsequent proceeding, a city employees' retirement board denied the fireman's application for a service-connected disability allowance, on the ground that his injury was not work related. The fireman petitioned the superior court for a writ of mandamus to set aside the retirement board's decision, on the ground that the appeals board's determination that the injury was work related was res judicata and the retirement board was collaterally estopped from finding that his injury was not work related. The court denied the writ. (Superior Court of San Diego County, No. 400022, Wesley B. Buttermore, Jr., Judge.)

On appeal by the fireman, the Court of Appeal reversed and remanded, holding that the appeals board's determination that the injury was work related became final 20 days after service of the award, when the time for filing a petition for reconsideration expired. The court held that the claim of collateral estoppel was valid, in that the issues and parties in both proceedings were identical. The court rejected the retirement board's contention that collateral estoppel should not operate because the burden of proof was less before the appeals board than it was before the retirement board. The court further held that the retirement board could not deny the appeals board's findings, for the reason that such findings were based on an unqualified stipulation. (Opinion by Ehrenfreund, J., * with Staniforth, Acting P. J., and Weiner, J., concurring.)

* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Judgments § 89--Res Judicata--Collateral Estoppel--Judgment on Merits. --For a claim of collateral estoppel to be valid, there must be a final determination on the merits in the prior proceedings.

(2) Workers' Compensation § 89--Proceedings Before Workers' Compensation Appeals Board--Findings, Award and Judgment--Conclusiveness and Effect of Award--As Res Judicata in Subsequent Claim Against City Employees' Retirement System. --A decision by the Workers' Compensation Appeals Board in which the board granted compensation benefits to a city fireman on the basis of a stipulation that his injury

was work related was res judicata in a subsequent proceeding involving the fireman's application to obtain a service-connected disability allowance from a city employees' retirement system. The appeals board's factual determination that the injury was work related became final 20 days after service of the award, when the time for filing a petition for reconsideration expired, and consequently the city retirement board was collaterally estopped from finding that his injury was not work related.

(3) Judgments § 83--Res Judicata--Collateral Estoppel--Identity of Issues. --For a claim of collateral estoppel to be valid, the identical issue must have been previously decided.

(4) Judgments § 84--Res Judicata--Collateral Estoppel--Identity of Parties. --For a claim of collateral estoppel to be valid, the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication.

(5) Judgments § 81--Res Judicata--Collateral Estoppel--Effect of Differences as to Burden of Proof. --A decision by the Workers' Compensation Appeals Board that a city fireman's disability resulting from a heart attack was work related collaterally estopped a city employee's retirement board from deciding, in a subsequent proceeding involving the fireman's claim for a service-connected disability allowance, that the injury was not work related, even though the retirement board's standard governing the burden of proof, which required the presentation of evidence that the injury was work related, was stricter than the appeals board's standard, under which there was a presumption that the injury was work related.

(6) Agreed Case and Stipulations § 14--Stipulations--Effect. --A stipulation may be a substitute for proof and, if within the authority of the attorneys, is binding on the parties, it is also binding on the court where it is not contrary to law, court rule or policy. A stipulation is also evidence, and a stipulated judgment is a decision on the merits.

COUNSEL: Popko & Cornblum and Hugh D. McLean for Plaintiff and Appellant.

John W. Witt, City Attorney, and Thomas F. Calverley, Deputy City Attorney, for Defendant and Respondent and for Real Party in Interest and Respondent.

JUDGES: Opinion by Ehrenfreund, J., * with Staniforth, Acting P. J., and Wiener, J., concurring.

* Assigned by the Chairperson of the Judicial Council.

OPINION BY: EHRENFREUND

OPINION

[*56] [**37] John C. Greatorex appeals from a denial of his writ of mandamus by the Superior Court of San Diego County. The single issue on appeal is whether a Workers' Compensation Appeals Board's finding that an injury is work related is res judicata in a later application for benefits made to a City Employees' Retirement Fund. We hold it is and reverse the denial of the writ.

Greatorex had a [***2] heart attack while employed as a fireman by the City of San Diego. He applied to the Workers' Compensation Appeals Board (Appeals Board) for compensation benefits. The City of San [**38] Diego stipulated his injury was work related. On March 30, 1977, the Appeals Board, adopting the stipulation, granted compensation benefits.

Greatorex also applied to the Board of Administration of the City Employees' Retirement System (Retirement Board) for a service-connected disability allowance (San Diego Mun. Code § 24.0501). Such [*57] allowance is granted only if the injury is work related. The application was denied on May 26, 1977.

Greatorex then petitioned the superior court for a writ of mandamus to set aside the Retirement Board's decision. He claimed the Appeals Board's determination of a work-related injury was res judicata and the Retirement Board was collaterally estopped from finding his injury was not work related. The writ was denied. Greatorex appeals the denial, asserting the same res judicata and collateral estoppel claim.

(1) For a claim of collateral estoppel to be valid there must be a final determination on the merits in the prior proceedings (*Solari* [***3] *v. Atlas-Universal Service, Inc. (1963) 215 Cal.App.2d 587, 592-593 [30 Cal.Rptr. 407]*). **(2)** When the Appeals Board took jurisdiction of the case, it necessarily decided Greatorex was employed and his injury was work related. Those two factual determinations become final 20 days after service of the award, when the time for filing a petition for reconsideration has expired (*Carter v. Superior Court (1956) 142 Cal.App.2d 350, 356-357 [298 P.2d 598]*; *Unruh v. Truck Insurance Exchange (1972) 7 Cal.3d 616, 633 [102 Cal.Rptr. 815, 498 P.2d 1063]*; *Lab. Code § 5903*; *French v. Rishell (1953) 40 Cal.2d 477 [254 P.2d 26]*).

The Retirement Board contends the decisions of the Appeals Board are not final for five years, basing their

contention on *De Celle v. City of Alameda (1960) 186 Cal.App.2d 574 [9 Cal.Rptr. 549]* and *Labor Code sections 5803 through 5805*. However, *De Celle* stands for the proposition that an Appeals Board's determination finding a work-related injury permanent, as opposed to temporary, is not final for five years. Under *De Celle* and the Labor Code, decisions regarding the amount of the award and the permanence of the disability [***4] are not res judicata until the five-year period has lapsed. Those decisions, however, are distinct and separate from the jurisdictional findings of employment and work-related injury which become final after the 20-day reconsideration period has lapsed.

(3) (4) In addition to finality, for a claim of collateral estoppel to be valid, the identical issue must have been previously decided and the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication (*Solari v. Atlas-Universal Service, Inc., supra, 215 Cal.App.2d 587, 592-593)*. The issue decided by the Appeals Board was whether Greatorex's injury was work related. The Retirement Board was concerned with the same question. The issues were [*58] identical. The parties in the two actions are the same since the city, as employer, was the real party in interest and appeared in both proceedings. (See *French v. Rishell, supra, 40 Cal.2d 477, 482*.)

(5) The Retirement Board maintains the Appeals Board's decision should not operate as a collateral estoppel because the burden of proof was less before the Appeals Board than it was before the Retirement Board. Rule 17 of [***5] the rules of the Retirement Board requires evidence be presented on the work-related issue before a decision is made. The Retirement Board's standard would thus be stricter than the Appeals Board's which gives firemen who develop heart trouble a presumption that the injury was work related (*Lab. Code § 3212*). This exact issue was raised by the City of Oakland in *French v. Rishell, supra.* The *French* court determined that the difference in burden of proof does not justify any exception to the general rule of res judicata (*French v. Rishell, supra, 40 Cal.2d 477, 481)*. We apply the same rule and reject the Retirement Board's contention. The decision by the Appeals Board that Greatorex's injury was work related collaterally estops the Retirement Board from deciding the injury was not work related.

An independent and additional reason why the city and its Retirement [**39] Board cannot deny the Appeals Board's findings is that the findings were based on an unqualified stipulation. **(6)** A stipulation may be a substitute for proof and, if within the authority of the attorneys [here not disputed], is binding on the parties. It is also binding on the court where, [***6] as here, the stipulation is not contrary to law, court rule or policy. (*Capital National Bank v. Smith (1944) 62 Cal.App.2d 328, 343 [144 P.2d 665]*; *Estate of Burson (1975) 51 Cal.App.3d 300, 306 [124 Cal.Rptr. 105]*.) A stipulation is evidence and a stipulated judgment is a decision on the merits (4 Witkin, Cal. Procedure (2d ed. 1971) Res Judicata, § 170, p. 3312). Here, in absence of any claim for equitable relief from the stipulation, the parties and those in privity with them, are all bound to accept the jurisdictional findings of fact made by the Appeals Board.

The denial of the writ of mandamus was improper. The case is reversed and remanded for a new proceeding consistent with this opinion.

EXHIBIT 17

LEXSEE 214 CAL. APP. 3D 563

JOHN J. BIANCHI, Plaintiff and Respondent, v. CITY OF SAN DIEGO et al., Defendants and Appellants

No. D007565

Court of Appeal of California, Fourth Appellate District, Division One

214 Cal. App. 3d 563; 262 Cal. Rptr. 566; 1989 Cal. App. LEXIS 974; 54 Cal. Comp. Cas 400

August 30, 1989

SUBSEQUENT HISTORY: [***1] Respondent's petition for review by the Supreme Court was denied November 15, 1989.

PRIOR HISTORY: Superior Court of San Diego County, No. 591078, Andrew G. Wagner, Judge.

DISPOSITION: For the foregoing reasons, the judgment granting Bianchi's writ of mandate, insofar as it is premised on the collateral estoppel effect of the WCAB ruling, is reversed. The matter is remanded for proceedings not inconsistent with this opinion.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A city police officer petitioned for a writ of mandate to order the city and its retirement board to grant his application for industrial disability retirement benefits. The trial court granted the writ, finding that the retirement board was collaterally estopped by a prior Workers' Compensation Appeals Board (WCAB) award. The WCAB had found that the officer suffered permanent, but not total, disability from a single, identifiable incident. The injuries found to be work related were orthopedic injuries together with some psychiatric component. In the later proceedings before the retirement board, the officer claimed he was permanently incapacitated from performing his job. The retirement board concluded that the orthopedic injuries, though work-related, did not incapacitate him, but that his psychiatric disabilities did permanently incapacitate him. However, they concluded also that the incapacitating psychiatric disabilities were not the result of his employment. (Superior Court of San Diego County, No. 591078, Andrew G. Wagner, Judge.)

The Court of Appeal reversed and remanded. It held that the trial court erred in according collateral estoppel effect to the prior WCAB award, inasmuch as the issues and parties in the two proceedings were not identical. The proceedings focused on different injuries, it held, since the WCAB proceeding focused only on a single incident which was not incapacitating, whereas the issues before the retirement board were whether that disability was of such degree to prevent the officer from performing his job duties and whether the long-term stress that in fact incapacitated him was work related. Further, it held, the retirement board was not a party to the WCAB proceedings, nor was it in privity with the city. (Opinion by Froehlich, J., with Kremer, P. J., and Benke, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Judgments § 81--Res Judicata--Collateral Estoppel--Statement of Rule. --A party may be collaterally estopped from relitigating a previously adjudicated issue if the issue previously and necessarily adjudicated is identical with the issue sought to be relitigated, the prior adjudication resulted in a final judgment, and the party against whom the collateral estoppel is invoked was a party to, or was in privity with a party to, the prior adjudication.

(2) Workers' Compensation § 89--Proceedings Before Workers' Compensation Appeals Board--Findings, Award, and Judgment--Conclusiveness and Effect of Award--Res Judicata Effect--Collateral Estoppel--Before City Retirement Board. --On a city police offi-

cer's petition for a writ of mandate to order the city and its retirement board to grant his application for industrial disability retirement benefits, the trial court erred in according collateral estoppel effect to the prior Workers' Compensation Appeals Board (WCAB) award, since the issues and parties in the two proceedings were not identical, and in granting the writ. The WCAB proceeding focused only on whether petitioner suffered some compensable permanent injury from a single, identifiable incident, which injury was not total, whereas the issues before the retirement board were whether the disability was sufficient to prevent his ability to perform his job and whether the long-term stress that in fact incapacitated him was work related. Further, the retirement board was not a party to the proceedings before the WCAB, nor in privity with the city.

COUNSEL: John W. Witt, City Attorney, Ronald L. Johnson, Assistant City Attorney, Eugene P. Gordon, Chief Deputy City Attorney, and Steven R. Gustavson, Deputy City Attorney, for Defendants and Appellants.

Thistle & Krinsky and Patrick J. Thistle for Plaintiff and Respondent.

JUDGES: Opinion by Froehlich, J., with Kremer, P. J., and Benke, J., concurring.

OPINION BY: FROEHLICH

OPINION

[*565] [**566] City of San Diego (City) appeals from a judgment granting John J. Bianchi's petition for a writ of mandamus. The judgment ordered the City and the San Diego City Retirement Board of Administration (Retirement Board) to grant Bianchi's application for industrial disability retirement benefits. We conclude the trial court erred when it accorded collateral estoppel effect [***2] to the prior Workers' Compensation Appeals Board (WCAB) award, and accordingly, we reverse the judgment.

1. *Factual Background*

Bianchi was employed by the San Diego Police Department commencing in March of 1972. During the course of his employment, he allegedly suffered orthopedic and psychiatric injuries, and sought workers' compensation benefits, filing two separate applications. Bianchi's first application (case No. 83 SD 76108) claimed he suffered a continuous-trauma injury to his psyche, arising out of and occurring in the course of his employment from March 1972 to November 29, 1982. In his second application (case No. 83 SD 76109), Bianchi claimed he suffered orthopedic and psychiatric injuries as the result of a specific [**567] incident on November 29, 1982, when he was involved in an altercation while arresting a burglary suspect. He claimed orthopedic injuries to his right hand, jaw and lower back.

The findings and awards on both applications, which had been consolidated for hearing and decision, were issued by the WCAB judge on December 18, 1985. On Bianchi's first application (the continuous-trauma psychiatric injury), the judge [***3] ruled Bianchi did not sustain a continuous-trauma injury to his psychearising out of his employment from March 1972 to November 29, 1982. On the second application (the specific-trauma claim), however, the judge found Bianchi had sustained compensable work-related injuries arising out of the November 29, 1982, incident. The injuries found to be work related were injuries to Bianchi's head, back and right hand, together with an associated "intermittent minimal to slight depressive disorder." On the specific-trauma claim, the WCAB judge found Bianchi had suffered a permanent disability of 12 3/4 percent, and awarded Bianchi $ 2,887.50, together with reimbursement of or payment for certain medical expenses.

Bianchi subsequently applied to the Retirement Board for industrial disability retirement, claiming he was permanently incapacitated from performing his job as the result of his orthopedic and psychiatric injuries. At the Retirement Board hearing the parties stipulated that Bianchi was permanently incapacitated. However, the City disputed that the psychiatric [*566] condition which incapacitated Bianchi was industrially caused. After hearing evidence regarding the nature [***4] of Bianchi's disabilities, both orthopedic and psychiatric, and evidence concerning the causes of each of those sets of disabilities, the Retirement Board denied Bianchi's claim that the disabilities permanently incapacitating Bianchi were industrially caused. Specifically, the Retirement Board concluded that Bianchi's orthopedic injuries, although work related, did *not* incapacitate Bianchi from performing his job duties. The Retirement Board further found Bianchi suffered from psychiatric disabilities which *did* permanently incapacitate him, but concluded the incapacitating psychiatric disabilities [1] were not the result of his employment as a police officer, but were instead the result of a combination of nonwork-related stresses. Accordingly, the Retirement Board denied Bianchi's application for industrial disability retirement.

1 Specifically, the Retirement Board found Bianchi suffered from multifaceted psychological disorders, including posttraumatic stress disorder, generalized anxiety disorder, alcohol dependence, intermittent explosive disorder, dependent personality disorder, paranoia and extreme psycho-

social stress (arising from his divorce, death of a teenage son, family conflicts, alcohol abuse and lack of close familial relationships).

[***5] Bianchi thereafter petitioned for a writ of mandate to compel the Retirement Board to grant his application for industrial disability retirement. He contended the WCAB award in the specific-trauma claim, which found some component of his psychiatric disability to be work related, collaterally estopped the City from litigating whether Bianchi's psychiatric problems were work related. The superior court agreed with Bianchi's contention and issued its writ of mandate to compel the Retirement Board to grant Bianchi's application. This appeal followed.

2. *The Superior Court Erroneously Granted Collateral Estoppel Effect to the WCAB Award Because the Issues and Parties Were Not Identical*

The sole issue is whether the superior court correctly granted collateral estoppel effect to the WCAB award. **(1)** A party may be collaterally estopped from relitigating a previously adjudicated issue if (1) the issue previously and necessarily adjudicated is identical with the issue sought to be relitigated; (2) the prior adjudication resulted in a final judgment; and (3) the party against whom collateral estoppel is invoked was a party to, or was in privity with a party to, the prior adjudication. [***6] (*Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal.3d 903, 910 [226 Cal.Rptr. 558, 718 P.2d 920]*.)

[**568] Under limited circumstances, a WCAB award to an employee may collaterally estop the employee's retirement board from relitigating issues [*567] previously decided in the WCAB proceeding. (See, e.g., *French v. Rishell (1953) 40 Cal.2d 477 [254 P.2d 26]*.) **(2)** However, the courts have more frequently declined to give WCAB rulings collateral estoppel effect in subsequent retirement board proceedings, either because of a lack of identity of parties (see, e.g., *Preciado v. County of Ventura (1982) 143 Cal.App.3d 783, 789 [192 Cal.Rptr. 253]*), or because of differences between the nature of the issues considered during a workers' compensation proceeding and the nature of issues considered by a retirement board proceeding. (See generally, *Reynolds v. City of San Carlos (1981) 126 Cal.App.3d 208, 212-213 [178 Cal.Rptr. 636]*; *Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 697 [133 Cal.Rptr. 154]*.)

Based on our review of the facts [***7] of this case, we conclude there was neither an identity of issues nor an identity of parties, rendering collateral estoppel inapplicable in this case.

A. *There Was No Identity of Issues*

The lack of identity of issues is frequently invoked to deny collateral estoppel effect to a prior WCAB ruling in a subsequent retirement board proceeding. Generally, a WCAB proceeding decides whether the employee suffered *any* job-related injury. If that injury results in some permanent residual loss (i.e., loss of normal use of a body part, impaired earning capacity, or some other competitive handicap in the labor market), the WCAB awards the employee a permanent disability rating. (See generally, *State Compensation Ins. Fund v. Industrial Acc. Com. (1963) 59 Cal.2d 45, 52 [27 Cal.Rptr. 702, 377 P.2d 902]* [defining meaning of permanent partial disability under workers' compensation law].) Retirement boards, on the other hand, focus on a different issue: whether an employee has suffered an injury or disease of such magnitude and nature that he is incapacitated from substantially performing his job responsibilities. (See generally, *Winn v. Board of Pension Commissioners (1983) 149 Cal.App.3d 532, 539 [197 Cal.Rptr. 111]*.) [***8] Because of the differences in the issues, "[a] finding by the WCAB of permanent disability, which may be partial for the purposes of workers' compensation, does not bind the retirement board on the issue of the employee's incapacity to perform his duties." (*Reynolds v. City of San Carlos, supra, 126 Cal.App.3d at p. 215*.)

Here, the limited issue litigated in the WCAB specific-trauma claim was whether Bianchi suffered any permanent disability as a result of work-related orthopedic and/or psychiatric injuries. The WCAB found work-related orthopedic injuries had been incurred, and also found some minor (i.e., minimal to slight) injury to Bianchi's psyche, denominated as a "depressive disorder," which was determined to be intermittent. The combined impact [*568] of the entire set of injuries, both orthopedic and psychiatric, supported a permanent *partial* disability rating of only 12 3/4 percent. [2]

2 Importantly, the same judge considered and rejected Bianchi's claim that he had also suffered a work-related continuous-trauma psychiatric injury. Moreover, the work-related injuries did not result in an award of permanent *total* disability.

[***9] The Retirement Board considered a significantly different issue: whether Bianchi was incapable of substantially performing his duties, and if so, whether the set of injuries or disabilities which caused the incapacity resulted from Bianchi's employment. The Retirement Board first concluded that Bianchi's orthopedic injuries, although work related, did not incapacitate him from performing his duties. Such a conclusion was entirely supportable. (*Reynolds v. City of San Carlos, supra, 126 Cal.App.3d at p. 215*.)

The Retirement Board then considered whether the set of psychiatric problems which *did* incapacitate Bianchi was work-related. At the Retirement Board hearings, Bianchi did not attribute the entire set of incapacitating psychiatric disabilities to the specific, November 29, 1982, incident. [**569] To the contrary, Bianchi's counsel argued (and his expert doctor testified) that the incapacitating psychiatric disorders were principally the product of *long-term* job-related stress and strain. [3] The Retirement Board, after considering the opinions of numerous expert doctors, concluded that the psychiatric disabilities which in fact incapacitated [***10] Bianchi were not work related, but instead had their genesis in non-job-related stresses.

3 Although Bianchi's application for industrial disability retirement attributed his psychiatric disorders exclusively to the November 29 work-related incident, Bianchi's presentation to the Retirement Board clearly shows his primary contention was that his disabilities were the product of the stresses he underwent over the long term. Bianchi's expert testified, for example, that: "My belief in Mr. Bianchi's case is that the stress and strain . . . he encountered *during the course of his career* as a police officer created or caused the depressive reaction." (Italics added.) Indeed, during cross-examination counsel for the City presented the expert with the two WCAB rulings, which stated that Bianchi's psychiatric condition was the result of the November 29, 1982, injury rather than the result of the long-term continuous trauma, and asked the expert if he agreed with that assessment. The expert stated: "Well, my opinion throughout the years as stated in my reports is different than that, so I would disagree with the [WCAB] judge . . . I would not be in agreement with [the WCAB judge."

During closing argument, Bianchi's counsel reinforced their contention that the disabling psychiatric problems were based on long-term job-related stresses and traumas: "The question becomes, did the job have anything to do with it [the psychiatric disability]? Did the environment have anything to do with it? Aside from my legal argument [that the WCAB specific trauma award is conclusive] . . . [y]ou can't take away from the fact that Mr. Bianchi had a number of years on the police department and was affected by what he saw, what he observed, what he was involved in, what engagements he had with other persons in the occupation. And he singularly -- he was affected by it."

Thus, the evidence and arguments at the Retirement Board clearly focused on whether Bianchi's incapacitating disabilities resulted from continuous and long-term job-related stresses.

[***11] [*569] Thus, the "issue" decided by the WCAB award was not identical to the "issue" litigated before the Retirement Board: (1) the WCAB dealt with work-relatedness of a disorder associated with a *single* incident, whereas the Retirement Board dealt with the work-relatedness of a set of disorders produced by *long-term* stresses; (2) the WCAB dealt with work-relatedness of a disorder which (even when combined with orthopedic injuries) did *not* totally disable Bianchi, whereas the Retirement Board dealt with the work-relatedness of exclusively psychiatric disorders which *totally* incapacitated Bianchi; and (3) the WCAB award found work-relatedness of a disorder denominated as "depression" (and described as both "intermittent" and "minimal"), whereas the Retirement Board addressed a different set of psychiatric disorders, variously described as "severe," "chronic" or "extreme." Because there is no "identity of issues," collateral estoppel is inapplicable. [4]

4 That the injuries considered by the WCAB were different from the injuries considered by the Retirement Board finds additional confirmation in the twin rulings by the WCAB. The WCAB specifically rejected Bianchi's claim that he suffered psychiatric injury based on long-term job stress and strain; however, it is precisely the psychiatric disorders resulting from long-term trauma which the Retirement Board addressed. Further, the "work-related" psychiatric injuries found by the WCAB did *not* result in a *total* disability award, but were instead amalgamated with other injuries for a partial award, whereas the psychiatric injuries considered by the Retirement Board were *totally* disabling. These differences thus convince us that the issues/injuries litigated in the WCAB proceeding were not identical to the issues/injuries litigated in the Retirement Board proceeding, rendering collateral estoppel inapplicable.

[***12] Bianchi relies heavily on *Greatorex v. Board of Administration (1979) 91 Cal.App.3d 54 [154 Cal.Rptr. 37]* to support the application of collateral estoppel. We find *Greatorex* to be factually inapposite. In *Greatorex*, a firefighter obtained a WCAB award for a heart attack which the parties stipulated was work related. The *Greatorex* court held the work-relatedness of the disability could not be relitigated in later retirement board proceedings, and applied collateral estoppel to require the granting of the employee's service-connected disability retirement. In *Greatorex*, the *injury* (i.e., the

heart attack) which resulted in the WCAB award was *identical* to the injury which incapacitated the employee for retirement purposes. Here, however, the [**570] psychiatric injuries are not identical, and hence the work-relatedness finding of the WCAB does not collaterally estop the City from contesting whether a *different* set of psychiatric injuries (the source of and reason for Bianchi's incapacity to perform his job) was work related.

B. *The Parties to the WCAB Proceeding Differed From the Parties to the Retirement Board Proceeding*

[***13] Even if the injuries litigated had been identical, collateral estoppel would only be appropriate if the Retirement Board were a party, or in privity with [*570] a party, to the WCAB proceeding. Absent such identity of parties, collateral estoppel is inapplicable. (*Producers Dairy Delivery Co. v. Sentry Ins. Co., supra, 41 Cal.3d at p. 910.*)

Bianchi argues the *Greatorex* court conclusively decided the requisite privity exists between the City and the Retirement Board. While *Greatorex* contains such language, [5] it is unclear whether the parties actually contested the existence of privity. More importantly, the *Greatorex* court reached its conclusion based solely on *French v. Rishell, supra, 40 Cal.2d 477*, and without the benefit of the subsequent analysis contained in *Traub v. Board of Retirement (1983) 34 Cal.3d 793 [195 Cal.Rptr. 681, 670 P.2d 335]*. In light of the *Traub* analysis, it is appropriate to reevaluate the *Greatorex* conclusion that the requisite privity exists between the City and the Retirement Board.

5 The *Greatorex* court peremptorily declared: "The parties in the two actions are the same since the city, as employer, was the real party in interest and appeared in both proceedings [citing *French v. Rishell, supra, 40 Cal.2d 477, 482]*." (*Greatorex, supra, 91 Cal.App.3d at p. 58.*)

[***14] In *Traub*, the California Supreme Court refused to apply collateral estoppel effect of a WCAB award, entered against the county for an injury sustained by a county employee, in the employee's subsequent application for disability retirement based on the same injury. The *Traub* court reasoned that the county retirement board did not act as a mere agent of the county, [6] but instead was an independent administrator of an entity distinct and separate from the county. In reaching this conclusion, the *Traub* court noted the retirement system was an entity distinct and independent from the county; that the retirement board was an independent administrator for the system; that membership in the retirement system was not limited to county employees, but instead included noncounty employees as participants; and that the system was funded not merely by the county (as employer), but also by contributions from participating noncounty employers and from participating county and noncounty employees. Moreover, the *Traub* court emphasized that because the retirement system was funded on an actuarial and contributory basis, any adjudication of a claim for benefits had an adverse economic [***15] impact on the employee-members, as well as on the county and noncounty employers. (*34 Cal.3d at p. 798.*) The *Traub* court therefore reasoned that because of "[t]he distinctive identity, constituency [*571] and interests of a county retirement system . . ." (*id. at p. 799*), a WCAB ruling would not have collateral estoppel effect because there was no privity. [7]

6 Where the retirement board is merely the agent for the employer in administering the employer's retirement fund, and has no independent existence, powers or responsibilities, a WCAB award against the employer may properly be accorded collateral estoppel effect against the retirement board. (*French v. Rishell, supra, 40 Cal.2d at p. 482.*) *Traub* distinguished *French*, however, because *Traub* concluded the retirement board in its case was not a mere agent or subdivision of the employer. (*Traub v. Board of Retirement, supra, 34 Cal.3d at p. 798.*)

7 The *Traub* court cited *Preciado v. County of Ventura, supra, 143 Cal.App.3d 783*, with approval. (*Traub v. Board of Retirement, supra, at p. 799.*) In *Preciado*, the court similarly concluded there was no collateral estoppel effect of a WCAB ruling against a county-employer in a subsequent county retirement board proceeding. *Preciado* found no privity existed because of a number of differences (in addition to the differences in the constituency between the county and the retirement system) between the two entities, as follows: (1) management was vested in a retirement board, the majority of whom were not county officials, but were instead drawn from the membership ranks of the retirement system and from the local community; (2) the board was empowered to make periodic actuarial studies and adjust the rates of employee and employer contributions, which the county was obliged to adopt; and (3) the board was empowered to hold hearings and to adjudicate claims for compensation independent of county control. (*Id. at pp. 787-789.*) For these reasons, the *Preciado* court concluded that, while the county may have been represented at the WCAB hearing, the distinct and substantially autonomous retirement board was not represented and could not be collaterally estopped. (*Id. at p. 789.*)

[***16]

[**571] These same factors demonstrate that the Retirement Board here is not in privity with the City. The retirement system is established as an independent entity; all funds for the system are required to be segregated from city funds, placed in a separate trust fund under the exclusive control of the Retirement Board, and may only be used for retirement system purposes. (San Diego City Charter, art. IX, §§ 141, 145.) The Retirement Board acts as an independent administrator empowered to conduct actuarial studies to determine conclusively the amounts of contributions required of the City and participating employees. [8] The board has the sole authority to determine the rights to benefits from the system, and to control the administration of and investments for the fund. [9] The Retirement Board has twelve members, the majority of whom are not City officers: three represent active members of the retirement system, one represents retired members of the system, one is an officer of a local bank, and three are independent citizens of the City. [10]

8 San Diego City Charter, article IX, sections 142, 143; San Diego Municipal Code sections 24.0901, 24.0801.

[***17]

9 San Diego City Charter, article IX, section 144.

10 *Ibid.*

Most significantly, the retirement system is a contributory system, based on actuarial tables established by the Retirement Board, with contributions to fund the system paid equally by the City *and its participating employees*. [11] Indeed, the system also encompasses non-city entities and employees. The San Diego Unified Port District, a special entity separate and distinct from the City (see Harb. & Nav. Code, appen. 1, §§ 1-88), and its employees participate in and contribute to the system on an actuarial basis. Thus, as in [*572] *Traub* and *Preciado*, any claim for benefits from the retirement system economically impacts not merely the City (the only party impacted by the WCAB award), but also imposes an adverse economic impact on the contributing members of the system (i.e., both City employees and port district employees) as well as on the treasury of the port district. Accordingly, while the City's economic interests may have been represented at the WCAB hearing, the economic interests of the retirement [***18] system participants were not represented; hence the parties to the WCAB were not identical to or in privity with the parties to the Retirement Board hearings.

11 San Diego City Charter, article IX, section 143.

For the foregoing reasons, the judgment granting Bianchi's writ of mandate, insofar as it is premised on the collateral estoppel effect of the WCAB ruling, is reversed. [12] The matter is remanded for proceedings not inconsistent with this opinion.

12 Nothing in this opinion should be construed as precluding the trial court, on remand, from reconsidering whether to grant Bianchi's petition for writ of mandate for reasons other than the collateral estoppel impact of the WCAB award.